

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, ex rel.,)	
W.A. DREW EDMONDSON, in his)	
capacity as ATTORNEY GENERAL)	
OF THE STATE OF)	
OKLAHOMA, et al.,)	
)	
Plaintiffs,)	
)	
-vs-)	No. 05-CV-329-GKF-SAJ
)	
TYSON FOODS, INC., et al.,)	
)	
Defendants.)	

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE SAM A. JOYNER
UNITED STATES MAGISTRATE JUDGE

MAY 6, 2008

REPORTED BY: **BRIAN P. NEIL, CSR-RPR, CRR, RMR**
United States Court Reporter

A P P E A R A N C E S

For the Plaintiffs: Mr. Robert A. Nance
Mr. Louis W. Bullock
Mr. Bob Blakemore
Mr. M. David Riggs
Mr. J. Trevor Hammons
Ms. Kelly Burch
Mr. Daniel P. Lennington

For the Defendant
Cargill: Mr. John H. Tucker
Ms. Theresa Hill

For the Defendant
Peterson: Mr. A. Scott McDaniel
Mr. Nicole Longwell
Mr. Philip Hixon

For the Defendant
Tyson: Mr. Robert George
Mr. Bryan Burns

For the Defendant
Cal-Maine: Mr. Robert Sanders
Mr. David C. Senger

For the Defendant
Simmons Foods, Inc: Mr. John Elrod

1 Tuesday, May 6, 2008

2 * * * * *

3 THE CLERK: This is Case No.
4 05-CV-329-GKF-SAJ, State of Oklahoma v. Tyson Foods.

5 Will counsel make their appearance for the
6 record, please?

7 MR. BULLOCK: Louis Bullock for the
8 State of Oklahoma.

9 MS. BURCH: Kelly Burch, State of
10 Oklahoma.

11 MR. NANCE: Bob Nance for the State of
12 Oklahoma.

13 MR. BLAKEMORE: Bob Blakemore for the
14 State of Oklahoma.

15 MR. RIGGS: David Riggs, State of
16 Oklahoma.

17 MR. LENNINGTON: David Lennington, State
18 of Oklahoma.

19 MR. HAMMONS: Trevor Hammons for the
20 State of Oklahoma.

21 THE COURT: Okay. That's the State of
22 Oklahoma.

23 MR. GEORGE: Robert George for Defendant
24 Tyson Foods and related entities.

25 MR. MCDANIEL: Scott McDaniel, Nicole

1 Longwell, and Philip Hixon here for Peterson Farms.

2 MS. HILL: Theresa Hill and John Tucker
3 for the Cargill defendants.

4 MR. GRAVES: James Graves here for
5 George's, Inc. and George's Farms.

6 MR. SANDERS: Bob Sanders for Cal-Maine
7 Farms.

8 MR. ELROD: John Elrod for Simmons
9 Foods, Inc., Your Honor.

10 THE COURT: All right. There are a few
11 folks behind the bench that are with us, which is just
12 fine. Well, actually it looks like we've got it down
13 to the real workers. I mean, we don't have the 60
14 lawyers this time, we've got the 25 real workers.

15 It's good to see everyone, it's been awhile,
16 but you've been otherwise involved with Judge
17 Frizzell. In fact, I guess now you're involved with
18 both of us. You're two-timing us on a regular basis.

19 We have four motions set on the docket today.
20 Beginning chronologically seems to me might be the
21 best way to go beginning with the motion 1418, which
22 is the status conference, whatever that is, on the
23 motion to expand the discovery period, then move to
24 document 1605, defendant's motion to compel
25 plaintiff's compliance with data production order,

1 then 1683 and 1684, which are Cargill defendant's
2 motions to quash 30(b)(6) notices, and then end up
3 with 1687 which is Oklahoma's motion for protective
4 order to quash deposition notice. So maybe
5 they're -- well, I don't know. I guess the first two
6 are both probably equally time-consuming.

7 Does anyone have any objection with that
8 order of proceeding?

9 All right. Well, if not, let's chew the fat
10 for awhile on 1418, which is the State of Oklahoma's
11 motion for discovery period. We converted this to a
12 status conference -- actually, we sort of thought we'd
13 talk about a status conference to begin with. I'm not
14 sure the order said that and so we tried to make it
15 clear. Basically, we need to find out today what it
16 is we're going to do in regard to motion 1418. It is
17 the plaintiff's motion at this stage.

18 It looks like to me that there's like three
19 positions procedurally available to us on motion 1418.
20 The first one would be that you could spend time on a
21 small amount of argument today and we can decide it on
22 the briefs. I mean, if that's what you think ought to
23 happen, then express that.

24 The second option is, you may want it set
25 down for a further complete oral argument by counsel

1 when we have more time and more detailed preparation
2 for that. That's an option.

3 Or you may think that we need a further
4 evidentiary hearing with expert testimony to examine
5 the Daubert issues. That's an option. So let me know
6 what you think when you present your position.

7 And with that, I think probably we can just
8 recognize counsel for the plaintiff for argument in
9 support of the motion to let us know what they think
10 should happen.

11 The defendants' responses all seem to fall
12 within one of three categories. They either say the
13 evidence isn't relevant, they say they've already
14 produced it all, or they say production is not worth
15 the cost of obtaining -- the probative value is
16 outweighed with the cost of production.

17 So with that, at this time we'll recognize
18 plaintiff for argument in support of their motion and
19 to let us know how you think we should proceed.

20 MR. NANCE: Well, Your Honor, I came
21 more prepared to talk about status than to argue the
22 merits of it but I can touch on some of it, if you
23 like.

24 THE COURT: Well, no. If we only want
25 to talk about the status, that's fine with me. I

1 just --

2 MR. NANCE: Well, here's where we are,
3 whether it's argument or status. I'll try to explain
4 the way you're right, the responses shake out.

5 We submitted an affidavit of Shannon
6 Phillips, who is an official at the Oklahoma
7 Conservation Commission in the water quality
8 department. She summarized both her own personal
9 knowledge and the results of numerous studies of the
10 impact of nonpoint sources and poultry litter on the
11 watershed. That was done in response to your order, I
12 think No. 1207, where you invited evidence on that
13 question.

14 No defendant has submitted any substantive
15 response to Ms. Phillips' affidavit. This is a
16 question that is of obvious importance in the case,
17 and it's a question where evidence and expert
18 testimony is equally available to both sides, we don't
19 have a monopoly on that, and had they had something to
20 offer, they could have offered it and should have
21 offered it but they have not.

22 So I believe that her testimony at this point
23 by affidavit is uncontroverted and that establishes
24 the relevance to the case and to the documents of the
25 practices of the defendants in land-applying poultry

1 waste more than five years ago.

2 I think there is no -- at this state and at
3 this state of the record there is no dispute on the
4 factual issue and really can be none, given the state
5 of the science, that land application of poultry
6 litter more than five years ago has impacted the
7 watershed both in the past and in the present. We
8 think there is no need for any hearing or evidence,
9 any further evidence, on that issue because at this
10 point it's uncontested.

11 As regard to the cost issue, no defendant has
12 submitted any evidence that there is an excessive cost
13 or burden in responding to the state's interrogatories
14 or in educating 30(b)(6) deposition witnesses beyond
15 the five-year limit. So I believe that is not an
16 issue in the case.

17 Tyson and George's claim they produced all
18 the responsive documents regardless of date;
19 therefore, there should be no additional cost to them
20 certainly in responding to interrogatories and
21 educating 30(b)(6) witnesses. Their statement is that
22 they've already gathered the documents and either
23 produced them or stand ready to do so.

24 I would note that Tyson at least has not
25 indexed the boxes they have produced to us in the

1 fashion required by the court but that may be an
2 argument for another day.

3 I think as regards responding to the
4 interrogatories and 30(b)(6) witnesses, there is no
5 dispute of fact before the court that would indicate
6 that that is overly burdensome or expensive. So the
7 state's motion should be sustained on that basis -- or
8 for those forms of discovery.

9 Cargill is the only defendant that submitted
10 any evidence of cost of document production, and they
11 only submitted evidence in the form of affidavits
12 regarding the cost of document production.

13 Now, in footnote 3 to their response at page
14 6, they admit essentially that they have withheld 200
15 boxes of documents which contain documents on
16 corporate knowledge and/or areas which they have
17 agreed to produce and are just awaiting the outcome
18 of this hearing or whatever happens on our motion to
19 produce those. We think there's no reason whatsoever
20 for them to hold up on that. They haven't articulated
21 one other than perhaps their own convenience.

22 Cargill as well has not indexed document
23 production in the boxes as the court has ordered.

24 THE COURT: Okay. Are these 200 boxes
25 outside the five-year limit or are there other reasons

1 they haven't been produced?

2 MR. NANCE: As I understand that
3 footnote, they're saying that within -- they're
4 corporate knowledge, which doesn't have a five-year
5 limit, or they are areas whereas between the parties
6 they have agreed to make production beyond the
7 five-year limit.

8 THE COURT: Okay.

9 MR. NANCE: And Tyson and George's claim
10 at least that they have either produced or stand ready
11 to produce their documents. We wonder why it is so
12 expensive for Cargill to do so, and we suspect that
13 it's been because it's been very lawyer-intensive.
14 That would be Cargill's option to produce them that
15 way.

16 Unlike the question of the state of the
17 Illinois River or the science behind the way
18 phosphorus is transported from waste application sites
19 to the water, Cargill's costs in assembling these
20 documents and such is not a matter of public knowledge
21 or it's not something that we can counter with an
22 affidavit of our own.

23 Therefore, I think if Cargill wants to go
24 forward on the basis of resisting production of
25 documents, as opposed to answering interrogatories or

1 30(b)(6) witnesses, I think there needs to be some
2 discovery to understand and prepare for a hearing on
3 that.

4 Peterson says that it has no per se objection
5 to producing things more than five years ago but
6 claims they need a more focused list of items and that
7 certain of our items that we've asked for are not
8 relevant. We've addressed that in the materials. I'm
9 not here to argue that. I'm just -- I'm reminding the
10 court where they're coming from.

11 The remaining defendants, besides Tyson,
12 George's, Cargill, and Peterson, did not respond, and
13 so we believe the court should deem our motion
14 confessed as to those defendants. They made no legal
15 argument. They made no factual presentation. Under
16 the local rules, the motion is confessed as to the
17 remainder.

18 Your Honor, no defendant has submitted any
19 authority to counter our original argument that the
20 statute of limitations does not run against the state.
21 They all pooh-pooh it. They all say we're wrong.
22 They all say they'll deal with it at some appropriate
23 time, but the appropriate time has come and has gone.

24 THE COURT: Okay. Are these defendants
25 that have not responded defendants that have produced

1 discovery?

2 MR. NANCE: Willow Brook has not
3 produced discovery. Cal-Maine has produced some.
4 Who's our other one? Simmons. I'm personally not
5 knowledgeable about the extent of Simmons' production.
6 I just can't answer your question. I apologize.

7 THE COURT: Okay.

8 MR. NANCE: The issue of statute of
9 limitations was one that was posed in your order 1207
10 which kind of started this process. We have briefed
11 it repeatedly, we've given you the applicable Oklahoma
12 authority on that, and no defendant has come up with
13 counter-authority because it just is the law that when
14 the sovereign state is acting in its sovereign
15 capacity, neither latches nor the statute of
16 limitations apply. We think that is something that is
17 ready for decision in our favor.

18 The defendants for the most part -- well, I
19 think universally took this to deal with document
20 production, and they just overlooked the fact that we
21 have sets of interrogatories out there, including one
22 which you have ordered to be answered, and that is the
23 number of birds.

24 You've ordered them -- and I'm not limiting
25 my request on that but I'm using that as an

1 example -- you have ordered them to produce
2 interrogatory answers under certain conditions
3 regarding the number of birds in the watershed going
4 back five years. On the state of the pleadings and
5 the record right now, every defendant should produce
6 interrogatory answers -- every defendant -- going back
7 as far as they have knowledge or they have a presence
8 in the watershed.

9 So there are other things just besides the
10 documents. There's the 30(b)(6) depositions for
11 witnesses that need to be moved past the five-year
12 limit. Right now, they're limited to educating them
13 for a five-year period.

14 I mean, you've said corporate knowledge goes
15 back as far as it goes back. Knowledge and action in
16 this case, I think, go hand in hand. We need to know
17 not only what they knew, but what they did about what
18 they knew, and we can't really do that adequately
19 without discovery going beyond five years.

20 THE COURT: Okay. Let's say -- and I
21 don't want to interrupt your presentation, but
22 eventually I'd like you to address the question of
23 let's say you win this argument, you get evidence back
24 from the beginning of time.

25 How do you see that proceeding from this

1 point forward? Number one, we have production of
2 documents, so I think they're saying they've produced
3 everything that is relevant from the beginning of
4 time.

5 MR. NANCE: Tyson and George's say that,
6 Cargill is obviously contesting that, and Peterson
7 says it doesn't have any objection -- per se objection
8 but it hasn't produced. That's kind of a rundown on
9 the ones that responded so it varies by defendant.

10 THE COURT: Do you have objections to
11 Tyson and George's saying that production has not
12 included everything from the beginning of time?

13 MR. NANCE: We think, at least in
14 Tyson's case, we need an adequate index to see what
15 we've got, the sort of index that you've required us
16 to do and I think is the universal rule in the case.
17 There are some documents that Tyson has made available
18 to us that we have not looked at. The last batch we
19 looked at in Fayetteville was not indexed.

20 THE COURT: Okay.

21 MR. NANCE: We're not eager to go
22 through that exercise again. That's, without more
23 argument than absolutely is necessary, I think where
24 the status is.

25 Now, is there anything else I can tell the

1 court by way of relevancy of it? Is that a question
2 in your mind?

3 THE COURT: Well, the real question is,
4 where do we go from here? Production, Tyson and
5 George's says they've done it, Peterson says they want
6 specifics, and Cargill is a little different.

7 Okay. So interrogatories, what do you think
8 would happen interrogatory-wise if you win this
9 argument?

10 MR. NANCE: They would supplement their
11 interrogatories to sweep in -- and I haven't looked at
12 all of them in preparing for this -- but they would
13 sweep in any evidence they have going back beyond the
14 five-year rule and particularly with the bird
15 numbers.

16 THE COURT: Do we know how many
17 interrogatories that includes at this point?

18 MR. NANCE: You know, I wrote a letter
19 limiting those -- it would be a number of
20 interrogatories.

21 THE COURT: Have you got a guess? I
22 mean, I don't remember. I haven't --

23 MR. NANCE: I think the way we limited
24 them -- because we had both a limitation in geography
25 and we had a limitation in time. From memory, two or

1 three dozen.

2 THE COURT: Oh, okay.

3 MR. NANCE: At least. And I can -- I
4 don't know if I have that letter with me, I may; and
5 if I do, I'll advise you if I get a chance to reply on
6 the way we framed that record.

7 THE COURT: And then we have deposition
8 testimony, and you would just like for them to be able
9 to testify in regard to issues beyond the five-year
10 period --

11 MR. NANCE: Correct.

12 THE COURT: -- in deposition?

13 MR. NANCE: And that may or may not
14 require in the case of an individual defendant a
15 redeposition, but that's certainly possible because
16 some of them have put up people that may not have been
17 educated beyond the five-year limit.

18 THE COURT: Yeah. Okay. Well, the
19 original question was, do you want another hearing on
20 this issue? It sounds like you're saying no, I mean,
21 you think you've got everything you want in at this
22 point, if the defendants don't put anything else in.

23 MR. NANCE: The only issue that might
24 need a hearing is if Cargill wants to press the cost
25 item. I think everything else, putting aside the

1 adequacy of indices and things like that that really
2 aren't tee'd up for this motion, I think everything
3 else in all other regards the court should grant our
4 motion. If we need to go further with Cargill alone,
5 then we will.

6 THE COURT: All right. That's clear.
7 Thanks.

8 MR. NANCE: Thank you, sir.

9 THE COURT: Okay. Mr. Peterson.

10 MR. MCDANIEL: Good morning, Your Honor.
11 Scott McDaniel for Peterson Farms.

12 THE COURT: The Peterson response is the
13 more amorphous of the four or five so it's probably
14 best that you start.

15 MR. MCDANIEL: Well, I appreciate that
16 we've afforded the court an intellectual challenge
17 with our response so I'm grateful to get the
18 opportunity to address you.

19 Now, obviously the different defendants are
20 coming at this time differently based upon their
21 position and their viewpoint on the discovery and how
22 the law applies so I can only speak for Peterson
23 Farms. I would like for that to be clear to the court
24 from the beginning.

25 Of the options you offered at the beginning

1 of your comments, what I would suggest is most
2 suitable to Peterson Farms is your first option, that
3 I would like to present you with a bit of argument and
4 status and how I request the court resolve the motion
5 as to Peterson. Then we believe the brief -- our
6 brief addresses the issue we'd like the court to
7 consider in resolving the motion. So on behalf of
8 Peterson, I don't think an evidentiary hearing,
9 particularly on Ms. Shannon's affidavit, is necessary
10 and I can explain that further.

11 I think the status can be fairly summarized
12 by the communication that I had with Mr. Garren,
13 counsel for the plaintiffs, back in mid March. We
14 made an attempt to resolve this motion short of our
15 response and this hearing and an evidentiary hearing.

16 The approach we took in dealing with
17 plaintiffs, which is reflected in the attachments to
18 the brief, is I was operating under the assumption
19 that in the case of Peterson -- and I was trying to
20 broker an agreement that would be suitable to all the
21 defendants -- I'm operating under the assumption that
22 the plaintiffs have got my client's operational
23 documents, which is really all we're talking about.
24 We know the knowledge documents are not at issue here.
25 So it's this Illinois River Watershed poultry

1 operational documents and information.

2 I was operating under the assumption that
3 plaintiffs have had this, they've got multiple,
4 multiple years of my client's documents, more than I
5 think they wanted or needed but they've got years of
6 it. So they know the kind of information my client
7 develops and maintains relating to poultry operations
8 and its relationships with growers, feed production,
9 etcetera.

10 They've taken our client's 30(b)(6)
11 deposition, they got our ESI production, and they took
12 the deposition of our custodian of records. My
13 approach to the attempt to negotiate a resolution with
14 the plaintiffs was, you know what my client's all
15 about. If you want to go back older in time, tell me
16 what information you're looking for and then you
17 provide that to me. I will take it to my client, I
18 will present it to the counsel for the other
19 defendants, and see if we can come up with a list that
20 we can all say, okay, fine.

21 That discussion gained a little bit of
22 momentum for a brief period of time, and I was under
23 the impression that Mr. Garren was taking that
24 proposal to his colleagues, they would discuss it, and
25 get back to me. Then in the response -- I think

1 you've seen it attached to our brief -- they said, no,
2 no, no, we're not going to do that, and the only thing
3 we can do is you must provide us exemplars of every
4 document that you maintain and then we'll decide which
5 of those we want. That didn't seem very productive so
6 we couldn't resolve it.

7 From that conversation with Mr. Garren, a
8 couple things were clear. The plaintiffs do not want
9 another mass of boxes of grower files. Those were
10 Mr. Garren's words: "I don't want anymore growers'
11 records. I've seen enough of that."

12 I said, "I understand. So tell me what you
13 want." So it's clear they don't want that.

14 Peterson Farms has no interest in spending
15 more time and money identifying those historical
16 growers, finding their documents, reviewing them,
17 redacting the confidential stuff pursuant to the
18 protective order, going through the expensing of
19 producing it if the plaintiffs aren't going to review
20 it and aren't going to use it. So that was a reason
21 why I asked for this list of the specific information
22 they believe they need in their case. I'm still
23 waiting on that list; that's the status.

24 But as far as the merits of the motion, these
25 discussions highlight for me -- and I hope it will

1 highlight for the court -- how this issue has really
2 changed a bit since the court entered its first order
3 setting the five-year limitation. And what I mean by
4 that is this whole issue -- I believe it was raised
5 within the context of the Cargill discovery but it
6 could have been Tyson. It doesn't matter. Your order
7 applied to us all -- and that is, we got some big, big
8 sets of requests for production of documents and then
9 some interrogatories.

10 On behalf of my client, there were a number
11 of those requests -- not all of them -- but a number
12 of them that we objected that they were overly broad
13 because there was no time limitation in the request.
14 That's what tee'd the issue up for the court, and the
15 court decided to impose a five-year limitation, which
16 was a reasonable approach, to deal with that
17 objection.

18 Now, what's now apparent to Peterson is the
19 issue is not -- from Peterson's perspective, the issue
20 is not whether information older than five years old
21 should be produced, and Mr. Nance accurately
22 represented our position to the court, that we don't
23 have an objection per se to information older than
24 five years old. That doesn't mean we don't have an
25 objection to the discovery or overbreadth. But it is

1 the nature of the information being sought that will
2 determine whether the plaintiffs' discovery is still
3 overbroad and I think should be the basis for the
4 court's decision.

5 As we discussed in our response brief, there
6 are courts in this circuit that have held that
7 discovery requests that are not limited to a
8 reasonable time period are overbroad on their face.
9 That's what we're dealing with here.

10 What I would encourage the court -- it's
11 reinforced in my mind from what I heard from
12 Mr. Nance -- is I would encourage the court to not
13 treat this discovery as one categorical, single issue
14 because their discovery -- the types of documents they
15 seek, the types of information they seek -- are across
16 a broad array. We've only raised this objection to
17 certain requests and we have -- and that, I think,
18 should be the basis -- for the plaintiff's motion, it
19 shouldn't be the basis for the court's decision.

20 THE COURT: Okay. Well, what would
21 happen if the court granted the plaintiff's motion and
22 said, you must update all production requests and
23 interrogatories since the beginning of time?

24 MR. MCDANIEL: From my client, what we
25 would have to do is a process that we've explained to

1 the plaintiffs in our multiple disclosures, including
2 ESI. We're going to have to undertake a process of
3 identifying historical growers.

4 In the time period prior to 2002, Peterson
5 Farms didn't track its growers by watershed, so it's a
6 manual process -- interviewing service techs, looking
7 on maps -- to try to generate a list, which we can do
8 with as much accuracy as people's memories will abide.
9 Then we're going to have to find those documents, find
10 the responsive information, and produce it.

11 That exercise, Your Honor, I'm not saying
12 that the court under no terms should require any part
13 of that to be done; that's not my argument. My
14 argument is, the plaintiffs have a burden to address
15 the facial overbreadth of their requests by showing
16 what information in which requests the court should
17 require us to answer because it has a reasonable
18 possibility of being probative in their case --

19 THE COURT: Okay.

20 MR. MCDANIEL: -- rather than this being
21 a make-work exercise.

22 THE COURT: So you're asking for a
23 supplemental motion to produce and supplemental
24 interrogatories which are more focused in the
25 beginning?

1 MR. MCDANIEL: Not necessarily. And if
2 I can continue, I can explain briefly what I'm
3 suggesting the court do.

4 What the plaintiffs -- the approach the
5 plaintiffs have taken to this issue is they've talked
6 about it solely in the temporal sense and whether five
7 years is an appropriate limit or it's not as if that's
8 all -- that's the sine qua non of the issue and it's
9 not.

10 This affidavit from Ms. Phillips, the reason
11 that Peterson doesn't think we need an evidentiary
12 issue and we need to put up a rebuttal expert is even
13 if you read it, it doesn't respond to the question
14 that I'm suggesting the court consider.

15 In one aspect, she makes a number of
16 conclusory statements about what historical water
17 quality was and what historical causes for that water
18 quality issues were, but she doesn't provide the court
19 any guidance for the answer -- to answer the question,
20 well, if it's not five years, then what should it be?
21 She doesn't provide you anything for you to adjust
22 your ruling. She just simply says, you know, there's
23 been water quality problems out there since the '70s
24 or '80s or '90s. Well, I don't think we have to fight
25 about that in the discovery process; those are

1 ultimate issues.

2 But what she doesn't tell the court is that
3 there is a basis for concluding that poultry
4 operations ten years ago is the source of a
5 present-day injury, and you framed that very question
6 for the plaintiffs when you invited them to take this
7 to the next level.

8 The --

9 THE COURT: Okay. While you're on that
10 point, you have not disputed their
11 statute-of-limitation arguments, and so if they argue
12 that damages committed 30 years ago can now be
13 recompensed --

14 MR. MCDANIEL: I definitely want to
15 address that issue and that's because that's not at
16 issue here. I would encourage the court not to accept
17 the invitation to make a ruling that would be the law
18 of the case on statute of limitations that would bind
19 the parties and potentially Judge Frizzell. That is a
20 summary judgment issue that the parties will raise.

21 The plaintiffs have made their argument
22 categorically that they're not bound by the statute of
23 limitations, but there's authority out there that
24 clearly establishes equitable remedies for -- from
25 remedies for damages. The defendants don't see that

1 as being a decisional issue for the court in order to
2 decide the probative value.

3 THE COURT: How do I find that evidence
4 from 30 years ago is relevant if I don't rule on the
5 statute of limitations?

6 MR. MCDANIEL: Well, because I think the
7 court made the right call back in July of last year
8 when you said that it needs to be relevant to a
9 current injury. I mean, the plaintiffs haven't put
10 anything before you about an historical injury they're
11 seeking recompense for; it's a current injury.

12 They're arguing there are historical actions
13 that caused a current injury, so if that action
14 occurred 30 years ago, the injury is present today and
15 we have a cause of action.

16 THE COURT: Okay. So there's enough
17 evidence in the record to find relevance based upon
18 damage 30 years ago but injury today?

19 MR. MCDANIEL: The question for the
20 court, Your Honor, is relevance of what? The "of
21 what" is defining the scope of individual discovery
22 requests that have been propounded. That's the point
23 I made earlier.

24 I would encourage the court not to make a
25 blanket decision like that because there are aspects

1 to the discovery that clearly are not going to assist
2 the plaintiff's case in any way if it's 20 years old,
3 30 years old.

4 A good example is, Mr. Nance mentioned
5 interrogatory No. 1, tell us the number of birds.
6 That is exactly the type of information I was asking
7 from the plaintiffs, focus your discovery, tell us
8 what you want. I've heard one answer, and you just
9 heard it too, we want to know the number of birds back
10 in time.

11 Well, if that's the court ruling, okay, we're
12 going to go back and do the best we can do to answer
13 that interrogatory.

14 THE COURT: Okay.

15 MR. MCDANIEL: So let's assume for the
16 sake of argument, Your Honor -- not necessarily
17 conceding it because of my position -- but if you rule
18 that the number of birds I find to be relevant to the
19 plaintiff's claims, give it to me as far back as you
20 can, that is a response that we can work with. If you
21 came -- that's it. Tell us specifically the
22 information that relates to the claims.

23 Why do they want to see temperature records
24 in poultry houses for the last 50 years? That's an
25 example of ridiculous stuff that -- and there are tons

1 of those records.

2 That's what I tried to lay out in my brief,
3 is the scope of their specific discovery gets to so
4 much more than the heart of this case. If we can
5 focus this to the heart of the case, then I have the
6 ability to respond on behalf of my client.

7 THE COURT: All right. Well, you are
8 not disputing then the relevance of the number of
9 birds in the watershed 20 years ago? You don't want
10 to concede that, but you don't want the opportunity to
11 present expert testimony or argument in opposition to
12 that relevance argument?

13 MR. MCDANIEL: Let me answer it this
14 way, Your Honor.

15 When I consulted with Mr. Garren, if he would
16 have said, Scott, if you'll on behalf of Peterson
17 Farms tell me the number of birds produced back as far
18 as you've got the data, that item on the list, the
19 focus list, I wouldn't have argued with him about
20 that, we would have set about doing it, but I never
21 got that answer.

22 The issue on the 30(b)(6) depositions, I
23 think there's a little bit of an error in the record
24 there at least as far as Peterson. What's been
25 created for Your Honor is this impression that at

1 these depositions anytime there was a question asked,
2 the defense lawyer said, "We're only answering within
3 the last five years" and that it was an issue.

4 Well, you can review the record in the
5 Peterson Farms' deposition and, you know, we stated
6 all of our objections in writing to the notice and
7 time limit was one of the objections. But in the
8 deposition, there was, to my recollection, never a
9 question that was asked and was not answered because
10 its scope exceeded five years.

11 So I think if the plaintiffs are going to
12 contend that they should be able to renotice and
13 retake my client's deposition, then they need to come
14 forth with specifics on the areas they believe they're
15 entitled to inquire into further.

16 Plaintiff's counsel has conceded that the
17 full production that they seek from Peterson will net
18 them a mass of documents they don't have any use for.
19 As we mentioned in our brief, you know, we've sent
20 them -- I think we produced something like about a
21 hundred-thousand pages to date.

22 Our client's 30(b)(6) deposition, there
23 weren't any grower file documents even used at the
24 deposition. The live production manager is sitting
25 there in the chair and they don't pull documents out

1 of growers' files in his deposition. None of them
2 were offered to Judge Frizzell in the motion for
3 preliminary injunction. These are not -- that's not
4 the information they seek.

5 From our perspective, Your Honor -- and this
6 is what I request the court do with response to the
7 motion -- we think it can be quickly and easily
8 resolved if the court will direct the plaintiffs to
9 provide Peterson Farms with a list carefully crafted
10 of the information they seek focusing on the issues
11 underlying their theories of the case and set a time
12 period, short as the court feels is appropriate, we'll
13 confer and hopefully agree. That will very much focus
14 this issue for the court. Either we'll resolve it and
15 get it done or not.

16 THE COURT: Okay. On page 6 of your
17 brief, you listed examples of overbroad requests, and
18 then page 5 of their reply brief they sort of went
19 over those one by one, did they not?

20 MR. MCDANIEL: Well, they went over
21 them. They glossed over them.

22 THE COURT: Okay. So you think that
23 what they have done on page 5 and 6 of their brief is
24 not sufficiently specific for what you're talking
25 about?

1 MR. MCDANIEL: That's correct.

2 Basically what they've done in their reply is
3 just justified their prior requests. They didn't say,
4 well, in that request that is this big, Your Honor, we
5 really only want this, this, and this. That would be
6 a meaningful response. They just simply try to
7 explain to the court that our brief was wrong, that
8 those aren't overly broad.

9 But what you have to bring to the analysis of
10 the discovery requests is an understanding of the
11 documents they reach. When you say, provide all
12 documents related to your production of feed, well, on
13 its surface that seems to make sense. Feed goes into
14 the birds, manure comes out the back end, and that
15 seems relevant. But do you know all the documents
16 that goes into the operation of a feed mill? Corn
17 purchases, every single additive purchases, feed mill
18 documentation, so much more than just a feed formula.
19 You know, we raised this with them the first time: I
20 don't think we're going to give you the documents for
21 every time we bought a carload of corn from Iowa.

22 So the same is true for the growers'
23 documents, that the company generates a lot of
24 documents related to the weekly operations of these
25 growers that had to do with simple efficiencies and

1 husbandry: temperature, you got your waterers too
2 high, too low, etcetera, Your Honor. So it's not a
3 function of time, it's a function of what they want.

4 And, Your Honor, if the plaintiffs are
5 unwilling to take that step and cure this overbreadth,
6 I think it should be overruled, but I'm more than
7 willing on behalf of Peterson to engage in this next
8 step.

9 THE COURT: All right. Thanks. One
10 last question.

11 What do you think the impact is of this
12 ruling on plaintiff's production to discovery?

13 MR. MCDANIEL: That's an excellent
14 question, not that your others weren't just as good.

15 The defendants believe that there is
16 information older than five years old that is relevant
17 to their affirmative defenses and their claims against
18 third parties.

19 We believe we have the same obligation, and
20 that is we have to focus that discovery on what goes
21 to the heart and is probative on those issues.

22 THE COURT: All right. Well, of course
23 that's --

24 MR. MCDANIEL: I think it is a
25 goose-and-gander proposition.

1 THE COURT: That issue is not tee'd up
2 for today, but it's a curious question as to
3 how -- what law of the case we might create that would
4 impact the plaintiff's production as well.

5 All right. Thanks.

6 MR. MCDANIEL: Thank you.

7 THE COURT: I understand.

8 All right. Who's next?

9 MR. GEORGE: Your Honor, Robert George
10 for the Tyson defendants, and I'll be brief. I really
11 just want to emphasize a couple points that I think
12 Mr. McDaniel touched on, but I want to make sure that
13 we surface them squarely for the court's attention.

14 First of all, I think it's dangerous and
15 anytime you get into a discovery fight to ask the
16 court, which is what the plaintiffs are doing in this
17 case, to make discovery decisions in abstract. I
18 think this is the point that Mr. McDaniel was making
19 regarding the lack of specificity in the discovery
20 dispute as the plaintiffs are trying to frame it.

21 Your Honor, you'll recall the five-year rule
22 as it was originally announced by this court came up
23 in the context of disputes over document production,
24 and that was the setting in which this court
25 determined that that is an appropriate balance between

1 the two positions of burden and relevance to require
2 the defendants to produce documents.

3 That, frankly, has been the limited context
4 in which this issue has been discussed with the court
5 all the way up until the reply brief filed by the
6 plaintiffs in this case, where for the very first
7 time, in my estimation or recollection, we begin to
8 see an attempt to broaden the controversy out into
9 unidentified disputes regarding 30(b)(6) depositions
10 that have occurred sometime in the past, and now this
11 morning, interrogatories.

12 And, Your Honor, I think it's perilous for
13 this court without specific interrogatories being
14 identified for which the plaintiffs can come forward
15 and establish relevance as to the information sought
16 in that interrogatory prior to five years ago and the
17 defendants can then respond with burden -- because as
18 this court can well appreciate, the burden of
19 responding to an interrogatory inherently depends upon
20 that particular interrogatory. Some are more
21 burdensome than others.

22 And so for Mr. Nance to take the podium, as
23 he did this morning, and suggest to the court that the
24 five-year rule ought to be abandoned with respect to
25 interrogatories -- and there are several dozen

1 interrogatories where he would like the defendants to
2 go back and provide responses, substantive responses,
3 encompassing information more than five years ago --
4 really is not helpful. It's not helpful to the
5 defendants because we're not in a position to evaluate
6 the burden associated with that.

7 It's also, Your Honor -- this is the second
8 point I want to emphasize -- the way in which the
9 plaintiffs have approached this dispute, particularly
10 in the areas of interrogatories and 30(b)(6)
11 depositions, runs contrary to this court's prior
12 statements and the federal rules' statements on the
13 importance of meet and confer. These are the issues
14 around particular interrogatories and particular
15 deposition questions that lend themselves uniquely to
16 conversation between lawyers to try to work things out
17 cooperatively.

18 I'll represent to the court that the 30(b)(6)
19 depositions of the Tyson defendants, my clients,
20 occurred many, many months ago in this case, and I
21 have not once had a single conversation with
22 plaintiff's counsel about an answer that they
23 perceived was unfairly limited in time or inadequate
24 because of concerns over the preparation of those
25 witnesses. This reply brief filed in connection with

1 this status conference is the first time where that
2 issue has been raised.

3 The same is true, Your Honor, with respect to
4 the only one interrogatory that I can identify they're
5 concerned with. They're speaking broadly, but the one
6 that was mentioned specifically was the one that is
7 subject to this court's prior order, where the
8 defendants were required to identify and quantify the
9 amount of birds. That has indeed been the subject of
10 many discussions and then, of course, an order by this
11 court.

12 But since the defendants have complied with
13 that order, I have not had a single conversation with
14 plaintiff's counsel where they suggested that my
15 answer on behalf of my client was inadequate.

16 THE COURT: Okay. Is your response
17 limited by five years to that question or does it go
18 beyond that?

19 MR. GEORGE: The court's order was
20 expressly limited to five years and we complied with
21 that. That's absolutely correct.

22 THE COURT: Mr. McDaniel said he's not
23 going to fight that issue. How do you feel about --

24 MR. GEORGE: I would like -- Your Honor,
25 if you're inclined to revisit in the context of

1 interrogatories, and in that one particular, the
2 five-year rule, I would like an opportunity to create
3 a record on burden.

4 Because, Your Honor, the ability to answer
5 that question -- as you'll recall, your order was very
6 detailed in terms of what the defendants must do to
7 attempt to answer that and what they must say about it
8 in terms of even requiring, I believe, the defendants
9 to state if a rate of error could be determined on
10 their method for quantifying. That was a burdensome
11 process, Your Honor. That's the reason we opposed
12 that in the first instance.

13 If we're going to roll that obligation back
14 to 1952, where records are even less readily available
15 and in some instances nonexistent, and the same
16 expectation for responsiveness is going to apply to me
17 and my client in answering that, I want an opportunity
18 to explain to the court in tangible terms what that
19 means in terms of burden. The way in which this issue
20 has been brought to the forefront in a reply brief has
21 not allowed me to do that.

22 THE COURT: All right. Well, you seem
23 to be diverging from Mr. McDaniel a bit on the number
24 of birds argument. But you do need to pick door
25 No. 1, door No. 2, or door No. 3 as far as the

1 original issue.

2 Do you think we need additional evidentiary
3 material or do you think another argument at a later
4 date or do you think we can do it based on
5 presentations today?

6 MR. GEORGE: I don't think we need an
7 additional evidentiary record around the Shannon
8 Phillips' affidavit, which was one of the issues
9 discussed. I do think to the extent the court is
10 interested in revisiting and we're going to weigh the
11 relevance and the necessity against the burden, then
12 we do need an opportunity to flesh that issue out
13 further.

14 THE COURT: Okay. So it sounds like
15 your position is that some data information prior to
16 five years may be relevant to this case?

17 MR. GEORGE: Correct, correct. I think
18 the court regrettably is going to have to take that on
19 a discovery-request-by-discovery-request basis.
20 That's unfortunate.

21 THE COURT: Okay.

22 MR. GEORGE: But, Your Honor, with
23 respect to any subsequent hearing, briefing, or
24 evidentiary matters that may be held around this, I'd
25 ask that we not -- that we not limit our thinking

1 about the evidence that should be presented to the
2 burden on the defendants because I think the
3 plaintiffs have not yet presented any evidence to
4 support the necessity of the information for their
5 experts, which is what I understand this motion to be
6 about. There are certain experts that need
7 information in order to offer opinions to this court.

8 Well, Your Honor, there's not a single
9 affidavit attached by an expert who has said, I need
10 an answer to interrogatory No. 1 going back to 1952 in
11 order to offer a causation opinion in this case, and I
12 don't think we should presume necessity.

13 The plaintiffs have an obligation to create a
14 record that establishes both the relevance and the
15 necessity of that information and they simply haven't
16 done it yet. So I would hope that any future hearings
17 on this would encompass both lines of evidence.

18 THE COURT: Well, now you stepped a step
19 back on me here.

20 MR. GEORGE: I'm sorry.

21 THE COURT: I thought we were not going
22 to have to any evidentiary presentations in the
23 future? I mean, I think what you're saying is, as of
24 the current level of the evidence, you do not desire
25 to present responsive evidence?

1 MR. GEORGE: I think the court ought to
2 deny the motion on its face today. But if the court
3 is willing to proceed further down the path and
4 believes that additional evidence is necessary, I'd
5 ask that both evidence as to burden and necessity be
6 presented.

7 THE COURT: Okay. But you're not asking
8 for an opportunity to present additional evidence --

9 MR. GEORGE: I'm not, Your Honor.

10 THE COURT: -- on this issue?

11 MR. GEORGE: I'm not, Your Honor. I
12 apologize for the ambiguity.

13 THE COURT: I understand it's mushy
14 necessarily so but --

15 MR. GEORGE: Right.

16 THE COURT: -- we'll clear it up.

17 MR. GEORGE: Thank you, Your Honor.

18 THE COURT: You bet.

19 All right. Is it turkey time?

20 MR. TUCKER: Gobble, gobble, Your
21 Honor.

22 THE COURT: Mr. Cargill.

23 Well, I didn't ask Mr. George, but I assume
24 he agrees with Mr. Peterson in regard to the impact of
25 this ruling on plaintiff's production?

1 MR. GEORGE: I do agree with that, Your
2 Honor.

3 THE COURT: Okay.

4 MR. TUCKER: Your Honor, I'd first like
5 to put to rest the issue of these 200 mystery boxes.

6 THE COURT: Okay.

7 MR. TUCKER: We did indeed footnote our
8 docket 1645 filed on March 21st advising that there
9 were 200 boxes that we were not spending the time,
10 effort, and money on because we believed that they
11 contain predominantly materials that were outside the
12 five-year discovery range and did not apply to the
13 corporate knowledge issue for which Your Honor did not
14 have a five-year limit.

15 As all this fuss has continued, rather than
16 contribute to the tenor of the ranker and the fuss, we
17 undertook to go ahead and go through those 200 boxes
18 without awaiting the outcome of the hearing.

19 And in document 1695 that was filed by this
20 court on May 2nd, which was our surreply on this
21 issue, we submitted a 34-page index that Ms. Hill
22 prepared which box by box describes the contents of
23 each box.

24 Also, that filing 1695 included, as a part of
25 the surreply, as a part of the exhibit that

1 accompanied that index, a letter inviting plaintiffs
2 at their leisure to come and examine the boxes
3 themselves which were in our office, not in a dusty
4 warehouse, having been brought from Arkansas for that
5 express purpose. That's been there since the last
6 part of April.

7 I would also note with respect to the whole
8 concept of specific questions about documents that
9 relate to operations and not corporate knowledge
10 outside the five-year period, at this court's
11 instruction and direction on July 19th, Ms. Hill met
12 and conferred extensively with the state.

13 As a consequence of that meet-and-confer, a
14 certain selection of documents were identified or
15 certain topics were identified and a further
16 production was made. Everything that was agreed to
17 being produced at that July 19th meet-and-confer
18 outside the five-year period has been produced and no
19 specific requests remain pending.

20 We also have several letters to plaintiff in
21 which we identify -- or which we ask them that if they
22 have other specific requests, if they'd please let us
23 know what they are then we would address them.

24 With respect to the concept of evidence, I
25 believe our evidence is before the court that it would

1 be extraordinarily expensive for the Cargill to review
2 the remaining 2,000 boxes, which I would describe as
3 the ancient documents.

4 Ms. Smith has reviewed those boxes in a
5 preliminary sampling fashion, and she says they are in
6 a warehouse, which is not climate-controlled, not
7 rodent-controlled, nor otherwise pest-controlled, and
8 is a very unsavory place.

9 Our affidavits that have been filed in the
10 case have estimated through the Faegre Law Firm, which
11 does this on a national basis and knows what it costs
12 to do these things, the cost that would be required to
13 make the analysis of these 2,000 boxes, which are all
14 older and have to do with operational materials, not
15 corporate knowledge, and that affidavit goes
16 unchallenged except by a response that says, we can't
17 challenge your affidavit.

18 So accordingly, if the plaintiffs wish to go
19 forward, other than on a point-by-point basis, which
20 offer remains outstanding to them, and they want this
21 blanket discovery that they've talked about, then we
22 would like to have them agree to pay the cost of doing
23 so based upon our affidavit.

24 THE COURT: Okay. Do you recite the
25 cost in your affidavit? I don't recall.

1 MR. TUCKER: Yes, Your Honor.

2 THE COURT: Do you remember what it was?

3 MR. TUCKER: I don't want to quote it
4 off the top of my head. Let me so find it in the
5 affidavit.

6 THE COURT: Well, I can pull the
7 affidavit out.

8 MR. TUCKER: \$2 million, Your Honor.

9 THE COURT: Good round figure.

10 MR. TUCKER: That's a minimum, Your
11 Honor.

12 THE COURT: Okay. Mr. Tucker, you
13 didn't pick door No. 1, 2, or 3, just to pin somebody
14 down.

15 MR. TUCKER: Your Honor, since my
16 affidavit as to cost is uncontroverted, I would say
17 door No. 1.

18 THE COURT: Okay. So you do not want an
19 evidentiary hearing at the current status of things?

20 MR. TUCKER: Yes, Your Honor.

21 THE COURT: Yeah. Okay. Thanks.

22 Well, it's a standard question, but do you
23 have a response in regard to the impact of the court's
24 ruling in this case in regard to plaintiff's
25 production?

1 MR. TUCKER: Your Honor, I believe that
2 the State of Oklahoma, if they want to take the
3 position that historic data is important, historic
4 data goes back to prestatehood time in the state's
5 archives, then I think they'd be obligated to produce
6 all that material.

7 THE COURT: Okay. Of course that's not
8 tee'd up at this point.

9 MR. TUCKER: No, sir, it's not.

10 THE COURT: Okay. Thank you.

11 MR. TUCKER: But I would assume if the
12 court entered that order, doing a supplement would
13 cause them to immediately begin that process.

14 THE COURT: All right. Other
15 defendants? We got Cargill, we got George's, we
16 got -- we have George's, yeah.

17 MR. GRAVES: Your Honor, James Graves
18 for George's. I will be extremely brief.

19 Our views coincide with those expressed by
20 Mr. George and Mr. McDaniel already. The state is
21 asking the court to take a shotgun approach
22 essentially -- a blind shotgun approach to the
23 temporal scope issue without teeing up specific
24 discovery requests with the specific defendants.

25 The issue I have probably goes maybe a little

1 bit beyond what's been expressed by Mr. McDaniel and
2 Mr. George. It's not only that there haven't been
3 specific interrogatories or requests for production
4 where they've contacted the defendants and stated, we
5 have some issue with the way these are responded to as
6 far as how far back you've gone, but they haven't done
7 it with the individual defendants either.

8 There's always a tendency by the state to
9 lump everybody together and make one presentation to
10 the court that defendants are or aren't doing
11 something as opposed to, you know, George's isn't
12 doing something or Tyson isn't doing something.

13 With regard to the status conference this
14 morning, I understand that Mr. Nance has made
15 representations about individual defendants, but if
16 you back to the original motion on this issue, there
17 was a lot of representations about what the defendants
18 were and weren't doing. Not until we got to the reply
19 brief stage did we have some argument about individual
20 defendants.

21 In those, same as Mr. George represented with
22 regard to Tyson, George's was suddenly presented with
23 some information in the reply brief about issues that
24 had never been discussed or a meet-and-confer had
25 never been scheduled or had never taken place.

1 And with regard to the issues that are raised
2 in the reply brief, you know, we have the
3 same concern. We didn't object on the basis of
4 temporal scope. We presented a 30(b)(6) deponent a
5 number of months ago. This deponent testified
6 extensively when he was asked questions about
7 operations in the Illinois River Watershed going back.
8 We had him prepared to testify to the extent that we
9 had any knowledge about that information, and when he
10 was asked about it he testified to it, including
11 property ownership in the watershed back in the '60s
12 and grower contracts in the '60s and '70s. So there
13 were no objections to those questions.

14 And so, again, if there's some issue that the
15 state has with the 30(b)(6) testimony of George's,
16 there hasn't been a meet-and-confer on it and there
17 ought to be some presentation to this court of
18 specific questions and answers and objections that
19 took place during that deposition that they feel were
20 inappropriate on the basis of this five-year issue.

21 With regard to the court's question about
22 which door, I don't see a need for an evidentiary
23 hearing. I think that because of the reply brief,
24 with regard to George's, there should be a further
25 hearing on these issues.

1 If the state's taking the position that
2 George's has not produced information or has brought
3 an ill-prepared 30(b)(6) deponent or someone who
4 didn't or refused to testify about these issues, then
5 that ought to be specifically presented to the court
6 so we can take it up with the court and the court's
7 not having to blindly deal with the issue.

8 I will say with regard to the interrogatory
9 that was brought up this morning, our response -- our
10 original written response was not limited on a
11 five-year basis and it was dependent on documents that
12 were produced; that is, schedules and reports going
13 back a number of years, however far back we had them.
14 But with regard to the totaling up, that is not
15 something that George's tracked routinely in its
16 business, a totally up by watershed.

17 And so in going through that gyration to
18 comply with the court's order, we did only go back
19 five years on that specific -- to comply with that
20 order as far as the totaling up went. But the
21 documents from which those totals came go back beyond
22 that five years and the state has them.

23 THE COURT: How do you feel about
24 totaling those figures up prior to the five years?

25 MR. GRAVES: I don't have an issue with

1 doing that, if that's what the court decides we need
2 to do.

3 THE COURT: Okay. But as I recall, the
4 problem before was the plaintiffs were not smart
5 enough to add it up based on the documents.

6 MR. GRAVES: Well, that took -- I mean,
7 it does take some work. I mean, a lot of these
8 records are paper, you've got to get them electronic
9 somehow, get them in a spreadsheet, and create
10 formulas for them and everything else. It's not
11 something you can just do.

12 THE COURT: All right. Thanks.

13 MR. GRAVES: Thank you.

14 THE COURT: I just realized that it's a
15 good thing Mr. George doesn't represent George's.

16 MR. GRAVES: We're smaller. He has a
17 lot more numbers to deal with than we do.

18 MR. SANDERS: Your Honor, Bob Sanders
19 for Cal-Maine. Cal-Maine did not respond to the
20 motion but I would like to explain our position, if I
21 could.

22 Cal-Maine is unique in a couple of respects
23 in this litigation. One, all of our birds were in the
24 IRW so we don't have the problems some of the other
25 defendants have of figuring out which of the birds

1 were in this watershed. Also, we were only in this
2 watershed from 1989 until -- through 2004. We sold
3 our very last flock and turned off the last light
4 switch in January of 2005.

5 Now, the Cal-Maine defendants presented to
6 the plaintiffs the total number of birds by category
7 of birds. We had breeders, pullets, and layers. We
8 gave them the total number of birds in each of those
9 categories for each of the years that we were in the
10 IRW in our core disclosures. That's how long ago we
11 gave it to them. We've given them our feed formula
12 and so forth.

13 Now, when we left the IRW in January of 2005,
14 we destroyed most of the data that we had. We have
15 some flock records that just didn't get destroyed,
16 they were in a warehouse and we've gone through those
17 and produced that, but we don't have very much
18 material.

19 The "dear responsible party" letter that went
20 out announcing the onset of this litigation came two
21 or three months after we closed shop and destroyed
22 documents. So we didn't respond because we already
23 gave them all the information well.

24 But so far as door 1, 2, and 3, Cal-Maine
25 does not wish to have an evidentiary hearing to

1 present any evidence on behalf of Cal-Maine. I don't
2 know if the plaintiffs would need to have an
3 evidentiary hearing or not, but we would take the same
4 position that Tyson and Peterson and George's have
5 taken.

6 Also, we certainly think that if the court
7 ultimately rules that the temporal scope will go back
8 to the beginning, then the same obviously should apply
9 to the plaintiff.

10 That's all I have. Thank you, Your Honor.

11 THE COURT: All right. Thank you,
12 Mr. Sanders.

13 All right. Anything else for the defendants?

14 All right. Plaintiffs, you wish to respond?
15 I mean, based upon the presentations by the
16 defendants, it sounds like the motion to compel would
17 be granted, it's just a question of with what
18 parameters. I think each of them has said some
19 evidence prior to the five years may be relevant
20 sufficient to allow some discovery prior to the five
21 years.

22 MR. NANCE: I think that's correct, Your
23 Honor. And I did not contemplate that today was the
24 day to get into the trenches and talk about individual
25 interrogatories and things like that.

1 THE COURT: No, it's not.

2 MR. NANCE: I did misspeak very early on
3 and I want to correct that.

4 I sent out a letter that limited the temporal
5 scope of interrogatories and I listed them by number.
6 We're not challenging any part of the court's order
7 that says -- excuse me -- the spatial scope and we're
8 not challenging that. You said we can't get
9 operational details from Maryland or wherever.

10 THE COURT: Right.

11 MR. NANCE: So I was saying these are
12 the interrogatories that we will limit to the IRW. I
13 just had that wrong in my mind when I told you it was
14 two or three dozen that we were still interested in.
15 We're interested in the whole ball of wax, but I
16 wanted to correct that because I just had that wrong
17 in my mind.

18 THE COURT: How big is that ball of wax?

19 MR. NANCE: Well, it's a fair-sized ball
20 of wax.

21 THE COURT: You mean as far as number of
22 interrogatories or --

23 MR. NANCE: Yes. We have served -- and
24 I wish I had thought to give you those numbers -- but
25 we have served several sets and there's comprehensive

1 discovery out there.

2 I think when you were talking to Mr. McDaniel
3 of Peterson, he said in his brief that certain of
4 these requests were irrelevant, and in our reply we
5 said, no, they're not and here's why.

6 Without going through all of that, I mean, we
7 asked questions because the defendants contest their
8 responsibility for the waste their birds produce, and
9 so it gets into trying to establish the element of
10 control that they have over the growers. I'm not
11 arguing that right now. I'm just saying that's one of
12 the reasons why we asked some of the questions we
13 asked.

14 You know, I don't specifically remember the
15 temperature in a house being one but it may have been.
16 But if an integrator dictates to a contract grower
17 that the temperature in the house is going to stay
18 within a certain band or parameter, then that's an
19 indicia of the amount of control they have over the
20 grower. I'm not going to go through all of that, but
21 that's why that can be important not so much that we
22 care about the temperature, but we care about the fact
23 that it's being dictated by the integrator.

24 THE COURT: Does it matter whether it
25 was done for five years or ten years?

1 MR. NANCE: Yes, it does. Because if --
2 I mean, if there were a material change -- I doubt
3 there were -- but I think they've pretty well
4 controlled these growers from the get-go. But I would
5 not want to face a situation where they say, well, we
6 only started doing that five years ago and we don't
7 have any evidence to rebut that.

8 Mr. Garren is not here, he's out of town
9 today, and I can't really say a whole lot about the
10 conversations that have been taking place. Except if
11 you look at Exhibit 1 to Peterson's response,
12 Mr. Garren says, "Clearly, as you point out,
13 birds/house counts are one item the state requests."

14 There's never been any question that we want
15 that, and the tendency is still to kind of dither and
16 want us to be more precise and that's been on the
17 table from the get-go.

18 No question we're wanting damages going back
19 as far as we can produce evidence. Prospective
20 equitable relief may be a different thing and we may
21 not need to go back 20 years, although we may, but
22 certainly the damage question goes back as far as the
23 evidence exists.

24 THE COURT: Okay. What would be wrong,
25 Mr. Nance, with asking the plaintiff to rephrase their

1 interrogatories or renew those interrogatories and
2 those motions to produce which they now knowing
3 everything they know about these defendants and their
4 operations that they still think is relevant beyond
5 the five-year period?

6 MR. NANCE: Well, Judge, we think
7 everything is relevant beyond the five-year period.
8 If we started the process over, we would be here
9 having this conversation a year from now because
10 they'd say, well, you sent out the new ones and we had
11 time and we've objected and we've had to have our
12 meet-and-confer.

13 If they have substantive beefs about the
14 interrogatories, other than the five-year issue, they
15 can and should have presented them. But we're here
16 today on the five-year issue and we shouldn't have to
17 start our discovery all over again just because I
18 think we're now concluding that things beyond five
19 years are relevant.

20 THE COURT: Well, it bothers me a bit
21 that you think everything is still relevant beyond the
22 five years. Surely there's something in there that's
23 not relevant beyond five years, especially if the ball
24 of wax is as big as you just said it is.

25 MR. NANCE: And if the defendants have

1 an individual concern about that on an individual
2 interrogatory, they need to pick up the phone and call
3 us. But today we're talking about the five-year
4 proposition, and if -- Mr. Garren has kind of been the
5 point on that part of the discovery. I haven't been
6 on that myself as much as I have on other things.

7 We all have the obligation to meet and
8 confer, but on the overarching question of whether or
9 not the five-year rule should stand, we think that it
10 shouldn't for the reasons we've talked about before.

11 The Tyson 30(b)(6) deposition was
12 specifically limited to five years but we haven't had
13 the ability to question that, to challenge that, until
14 such time as you rule because at the time it was taken
15 five years was the operative rule.

16 THE COURT: But the problem is, we're
17 now getting down to the nitty-gritty and neither side
18 really, I think, has given the evidence that the court
19 needs.

20 The question is, who's going to start this
21 ball rolling, whether or not we're just going to say,
22 okay, defendants, you got to respond beyond five years
23 on every interrogatory and every motion to produce; or
24 whether or not the plaintiffs should be obligated to
25 say, what we really want is the answers to

1 interrogatory 1, 2, 22, 84, and 63 beyond the
2 five-year period.

3 You're not giving me any information with
4 which to make that decision. I mean, are we talking
5 about 246 interrogatories?

6 The defendants haven't provided that either.
7 I just need to know how to make that decision. We
8 need something -- we need some information on the
9 burdensomeness of the response.

10 MR. NANCE: Well, one of the defendants
11 has submitted something on burdensomeness, none of the
12 others have. They've all had that opportunity.
13 That's clearly tee'd up by your original order.

14 THE COURT: Does it respond to all
15 motions to produce and all interrogatories? I don't
16 recall it. I just was wondering.

17 MR. NANCE: That's what the five-year
18 rule has -- it has specifically been applied to
19 documents and it's specifically been applied to
20 deposition and it's specifically been applied on
21 interrogatory No. 1 to bird counts. So it's been
22 applied to every form of discovery that we're engaged
23 in.

24 THE COURT: I mean, is that what Cargill
25 did in their affidavit?

1 MR. NANCE: Cargill addressed documents
2 only.

3 THE COURT: Okay. So we still got the
4 rest of that ball of wax?

5 MR. NANCE: Well, why would they need a
6 do-over now? I mean, if this was the day we were
7 going to have the status conference and the responses
8 are all in, it seems like maybe only now they're
9 considering, well, we should have written a better
10 response or we should have --

11 THE COURT: No. The problem is the
12 court needs the information. I mean, if it's 245
13 interrogatories, I need to know where they are
14 and that there are that many. I mean, I'm from the
15 government, I'm here to help. I just need the
16 information with which to do it.

17 MR. NANCE: Actually so am I today.

18 *(Discussion held off the record)*

19 MR. NANCE: Mr. Hammons reminds me,
20 again, I may have been confused between RFPs and
21 interrogatories. They're limited to 25 per company.
22 Both sides may have gone over that a little bit but it
23 hasn't been astronomical.

24 So with interrogatories it's going to be a
25 discreet number and requests for production have been

1 a great deal more, I think, on both sides. Of course
2 No. 1 is No. 1 for a reason and that's the bird count
3 one.

4 THE COURT: All right.

5 MR. NANCE: And if there are defendants
6 that have already given us everything, then, I mean,
7 it's no longer an issue. I mean, the court can rule
8 that the five-year rule doesn't apply and if they've
9 already provided everything, it will not affect them
10 at all. It's only in those areas where it's been
11 contested.

12 As regards Cargill ever so briefly, I mean,
13 you can read their footnote that -- footnote 3, "The
14 Cargill defendants' only document production remaining
15 out the court's current orders pertain to
16 approximately 200 boxes. These 200 boxes are a
17 portion of the storage documents believed to contain
18 documents relevant to corporate knowledge and the
19 limited categories discussed in the parties' July 19th
20 meet-and-confer." That's the ones they said they
21 would produce.

22 As to the index of that, that is in their
23 surreply, and you can take a look at it as well as I
24 can. It does not tie any of these boxes to any of our
25 requests as required by the court. And, again, that's

1 maybe a battle for another day but it's simply not a
2 proper index.

3 THE COURT: Okay. How soon would you
4 like to see a supplemental response from the
5 defendants if we go beyond the five years?

6 MR. NANCE: Without giving up any of
7 the other interrogatories or requests for production,
8 I think a response to interrogatory No. 1 within two
9 weeks? Thirty days?

10 THE COURT: Okay. Is there something
11 going on that makes that time crucial?

12 MR. NANCE: Well, even two weeks or
13 thirty days may prove a problem for us in our expert
14 reports. Experts need those numbers to fine-tune what
15 they're doing and the opinions they're forming and our
16 expert reports are due next week. But that's
17 probably -- if I had to prioritize, that's the first
18 priority we'd like to get.

19 THE COURT: Well, obviously you're not
20 going to have that in time for your expert reports.

21 MR. NANCE: And we may either have to
22 ask leave to supplement that or whatever, that may be
23 something for another day, but that is the most
24 important thing for us.

25 THE COURT: Okay.

1 MR. NANCE: Any other question on that,
2 Your Honor?

3 THE COURT: No, no. Thank you. I was
4 going to ask the defendants what they think about a
5 time line.

6 Mr. George?

7 MR. GEORGE: Your Honor, it may be
8 helpful to a fault, but I want to address the court's
9 question, which is a logical one, in terms of how big
10 the ball of wax is.

11 I have some command of the number of
12 discovery requests that my clients have received. And
13 with respect to interrogatories, the Tyson defendants
14 have received over a hundred interrogatories from the
15 state, all of which we have responded to, and we have
16 received over 450 motions to produce or document
17 requests. So that gives you some sense at least with
18 respect to the clients that I represent. I think
19 there's probably some similarities given that there's
20 a pretty standard set being sent to each of the
21 defendants.

22 With respect to the timeliness question, Your
23 Honor, I think it depends on what the order is in
24 terms of, are we talking about interrogatory 1 or are
25 we talking about all interrogatories? Obviously, the

1 answer would be different. I would say this, though.

2 With respect to interrogatory No. 1, my
3 client would not be capable of answering that in two
4 weeks if the court's order were: Tell us the number
5 of birds in the watershed from the beginning of your
6 operation. The reason for that, Your Honor -- and I
7 want to make sure the court has a full appreciation of
8 this process -- those are not standard reports.

9 What we had to go through -- and it was a
10 lengthy process in order to comply with the court's
11 order to provide that information for a five-year time
12 period -- was take information from reports, piece it
13 together, and feed it into a program, an Excel
14 program, and perform some mathematics. The data entry
15 piece of that is substantial, particularly for my
16 client who has a considerable presence in the
17 watershed.

18 But, Your Honor, the other thing I want to
19 make sure is not lost on the court, if the order is to
20 provide that information to the best of our ability
21 going back to 1952, I want to be completely forthright
22 so there's no confusion. My client will not be able
23 to competently answer that question for all periods of
24 time going back historically. The records simply do
25 not exist to re-create information that has not been

1 maintained because it wasn't necessary for the
2 business practices.

3 So I don't want the court or the plaintiffs
4 to be under any illusion as to the effectiveness of
5 this court's order, and I say that with all due
6 respect. It's one thing to order a defendant to
7 respond to an interrogatory, but it's entirely another
8 to suggest that a party must acquire knowledge that
9 they don't have.

10 And sometimes I believe -- the state may
11 differ with me on this -- it is an acceptable answer
12 to an interrogatory to say, "I do not know." But the
13 requirements of this court's prior order left very
14 little room for that within the context of recent
15 history, five years.

16 So I'd ask the court to at least consider
17 that in terms of how you would phrase any obligation.

18 THE COURT: All right. And you can't do
19 two weeks, so what can you do?

20 MR. GEORGE: I think it would take at
21 least a month, Your Honor.

22 THE COURT: Okay. Thirty days.

23 Yes, Mr. Tucker.

24 MR. TUCKER: Your Honor, if I may, I'd
25 like to ask the court to consider door No. 4.

1 THE COURT: Okay.

2 MR. TUCKER: I call the court's
3 attention to document 1645-4, which is filed on March
4 21 of '08.

5 THE COURT: 45-4?

6 MR. TUCKER: Yes. Page 1 of 5, which is
7 a letter dated August 2nd from Cargill to Mr. Nance
8 and Mr. Hammons that essentially commemorates the
9 meet-and-confer that took place on July 19th at this
10 court's order with regard to this issue and other
11 issues regarding production of documents.

12 I would suggest that at page 2, item E, a
13 feasible and workable solution to the court's concern
14 and the plaintiff's concern was expressed as a
15 consequence of the agreement reached by those parties
16 at that meeting.

17 "During the meet-and-confer" -- and I'm
18 reading from this page -- "the state's request for
19 document production without regard to date was
20 confined to a discussion about contract grower files,
21 flock evaluation reports, and breeder farms. However,
22 the state reserved the question of whether there were
23 other categories of documents as described in the
24 Cargill defendants' production cover letters and
25 detailed index provided to the state from which the

1 state would like documents produced prior to 2002.

2 "Examples of other potential categories
3 include prime cost files, feed formulas, job tickets,
4 microtickets, mixing sheets, run reports, usage
5 reports, batching pulleting sheets, feed ticket sales
6 invoices, ingredient usage summaries, production
7 reports, receiving tickets, lab certificates, or
8 miscellaneous ticket sales invoices.

9 "It is our understanding that the state will
10 get back to us in the near future with its proposed
11 additional categories for consideration, if any.
12 Through this letter, the Cargill defendants confirm
13 that if confined to the contract grower files, flock
14 evaluation reports, and environmental audits as
15 discussed above, they may withdraw your burdensomeness
16 objection with regard to date limitation. However, we
17 are not able to make a final determination regarding
18 cost and burden until we have the state's complete
19 list of proposed categories."

20 Nothing further has been received from the
21 state in regard to that, Your Honor.

22 THE COURT: Is that a copy that you can
23 present to the court at this time? I mean, I'm sure
24 we can dig it out, but it seemed to be so deep in the
25 files that it might be safer to -- I don't want to

1 take your only copy.

2 (Discussion held off the record)

3 THE COURT: Oh, that's fine. I just
4 want you to be able to hang on to it. We're not going
5 to talk about it. Thank you very much.

6 MR. TUCKER: Thank you, Your Honor.

7 (Discussion held off the record)

8 THE COURT: All right. We've got it.

9 MR. TUCKER: I simply suggest that as a
10 door No. 4 that requires the plaintiff to take some
11 specificity with regard to what they want as they were
12 agreeable to do in July of 2007.

13 THE COURT: All right. That's helpful.
14 I appreciate it. We could do door No. 4.

15 Mr. Nance, you know, I just thought that, you
16 know, you said everything needed to be included.
17 Apparently, Mr. Garren's already said he doesn't want
18 grower files.

19 MR. NANCE: Your Honor, as always, we're
20 willing to talk with them, but the things they agreed
21 to provide in that letter are the things in the 200
22 boxes that we still haven't seen. They're holding
23 back acknowledging that they've agreed to produce them
24 and that there are corporate knowledge documents in
25 there.

1 I mean, I think the motion should be as to
2 everything. Then we can discuss with them, if they
3 say, oh, my gosh, we just can't do that, let's find
4 something sensible, we'll try to work with that.

5 As regards -- Ms. Burch reminds me I didn't
6 answer your whole question earlier. I did as to
7 interrogatory No. 1. We would think in terms of a
8 45-day target date for the balance of it with
9 discussions and to meet and confer if they can't -- if
10 they can't do it or if they have discreet issues that
11 we need to discuss. I didn't want to leave, you know,
12 no target for the balance of it.

13 THE COURT: You know, 450 motions to
14 produce, that's a lot.

15 MR. NANCE: It is a lot because we have
16 dealt with that many as well. The Tyson defendants
17 have, I assume, 25 interrogatories a piece, not a
18 hundred a piece. There's four companies.

19 THE COURT: Right.

20 MR. NANCE: But it is a great deal and
21 we have dealt with it and sometimes have come before
22 you because the other side doesn't think we've dealt
23 with it well enough.

24 THE COURT: But you don't think you
25 could pick a hundred out of there that were

1 specifically relevant to the excessive temporal
2 limits? You think all 450 need consideration for the
3 expanded period?

4 MR. NANCE: I'm honestly not sure. If
5 the court would like us to prioritize, we can try.
6 But just as I stand here right now, I'm not sure that
7 we could.

8 THE COURT: All right. Thanks.

9 All right. We'll assume all the argument is
10 submitted. Mr. Elrod, you've done a good job.

11 MR. ELROD: Your Honor, I'm not going to
12 select a door without knowing what's behind it.

13 THE COURT: That's a good decision.
14 Well, we will let you know what's behind that door in
15 the near future.

16 We'll come up with an order that hopefully
17 does the right thing. That's our goal, in the words
18 of Spike Lee.

19 We're determined to get all of these issues
20 finished this morning so we'll assume that issue is
21 submitted. Let's move on to the other more meaty
22 issue, which I think is 1605, the defendant's motion
23 to compel. This is the defendant's motion to compel
24 plaintiff's compliance with the court order on data
25 production --

1 MR. SANDERS: Are you ready, Your Honor?

2 THE COURT: -- jointly presented by the
3 defendants.

4 MR. SANDERS: Yes. Are you ready?

5 THE COURT: Yes, sir.

6 MR. SANDERS: Bob Sanders representing
7 the Cal-Maine defendants, Your Honor.

8 I know a lot of paper is generated in this
9 motion and it's an extremely important motion to the
10 defendants, but I think it's a fairly simple motion at
11 the same time. The interesting thing to me about it
12 is that it's a motion not to compel responses to
13 discovery, but is a motion to compel adherence to a
14 court order.

15 The order, of course, is docket No. 1016.
16 It's your order of January the 5th of 2007. And in
17 that order, you instructed the plaintiffs to give the
18 defendants data, testing, sampling materials -- I
19 mean, sampling results, lab results, assay reports,
20 QA/QC documents, sampling protocols, photographs, and
21 site schedules. The court ordered the plaintiff to
22 produce all existing material in those categories by
23 February the 1st, 2007.

24 We got some information on February the 1st,
25 2007, but even to date we don't have all of the

1 information that the plaintiffs have.

2 THE COURT: Mr. Sanders, could I do a
3 very charitable act?

4 MR. SANDERS: Sure.

5 THE COURT: I just realized we have not
6 taken a morning break. It's really not fair. I
7 usually don't need one but the poor court reporter is
8 over here in pain. Let's take a ten-minute break and
9 be back here at five, seven after and give us a little
10 fresh start.

11 All right. We'll be in recess.

12 *(Short break)*

13 THE COURT: Linda said we're mostly
14 ready so I guess that's close enough. I didn't
15 acknowledge Brian Neil, our court reporter, this
16 morning when we started.

17 All right. Mr. Sanders, everyone has a smile
18 on their face now.

19 MR. SANDERS: All right. Thank you,
20 Your Honor.

21 The motion that we have filed covers all of
22 the data that we believe we're entitled to and that we
23 believe has not been produced. But I do want to
24 highlight or at least talk about one instance that was
25 highlighted in the defendant's original motion, and

1 that's the issue of the DNA sampling. If I can just
2 go through a little bit of the history on that.

3 From information that we have obtained, it
4 looks like the plaintiffs had their DNA protocol as
5 early as April of 2006. Then the first production
6 that we got from the plaintiff on this was in August
7 of 2007. Then we got what was to be the plaintiff's
8 file production on December the 20th, 2007. Then we
9 deposed Dr. Harwood, the lady who was using this DNA
10 material, on January 29, 2008, just shortly before the
11 preliminary injunction hearing.

12 At that deposition, we handed her a handful
13 of e-mails that we had received in production in
14 conjunction with her work and asked her if that was
15 all the e-mails that there were, and she said that no,
16 there were tons of e-mails. So we asked to see those
17 e-mails and the plaintiff made a fairly hurried
18 production of e-mails that related to Dr. Harwood.

19 In that e-mail production, we found this
20 e-mail of December the 12th, 2006. This is an e-mail
21 from Dr. Olson to Dr. Harwood and it -- the language
22 in the e-mail makes it very plain that the plaintiffs
23 were trying to agree upon wording that would conceal
24 the nature of this DNA testing.

25 The plaintiffs in their response say that

1 there was no need for them to produce some of this DNA
2 material at the time because it was privileged, but
3 this e-mail doesn't talk about privilege and it
4 doesn't talk -- it doesn't say anything like the
5 lawyers will address this on privilege. It's clear
6 that the language in this e-mail was designed to
7 conceal the data and deceive the defendants about the
8 existence of the data. Obviously, if we didn't know
9 that data was there, then there's not much that we can
10 do that would even trigger a privilege argument from
11 the defendants.

12 We highlight this particular e-mail because I
13 think that this e-mail and the story that this e-mail
14 tells should inform the court's consideration of this
15 entire motion.

16 Now, one of the -- another big problem that
17 the defendants have is that the plaintiff has taken
18 the position that it will not produce scientific data
19 to us until that data has gone through a QA/QC
20 process, and I don't think that there's any authority
21 for the plaintiff to take that position.

22 The court's order of January of 2007 talks
23 about separate items. It says, data sampling, lab
24 results, QA/QC results. It indicates that they all
25 should be sent to us, but it does not say that the

1 plaintiffs can hold out material until some other
2 process has occurred. The fact is that the QA/QC
3 process takes months, sometimes it takes more than
4 months. In the meantime, we don't have the raw data.
5 We only get what the plaintiffs give to us when they
6 want to give it to us. They give it to us after the
7 QA/QC process is completed.

8 And the real problem is that we don't
9 have -- we're running out of months here. Our expert
10 disclosures are going to be due three months after the
11 plaintiff's expert disclosures and we can't keep
12 waiting periods of months for the QA/QC process to run
13 its course.

14 Also, these motions to compel take months.
15 The present motion was filed, I think, February the
16 29th of this year and it's May the 6th now that we're
17 arguing the motion. And, again, these delays in terms
18 of months are going to be critically prejudicial to
19 the defendants. We have to get -- we're starting to
20 run up against some hard deadlines and we have to get
21 our experts up to speed and we can't do it if we don't
22 have the data.

23 Now, the plaintiff's response to this motion,
24 I think, demonstrates the merits of the motion. The
25 plaintiff's response came on March the 25th, 2008.

1 The first thing they did when they responded was give
2 us a large production of data that should have been
3 produced much earlier. Then the written response, the
4 pleading they filed, said, okay, now this motion is
5 moot, they have everything.

6 Well, about a week later on April the 4th,
7 2008, they made another -- they sent another batch of
8 production materials to us. Then they made two more
9 productions since then, one on April the 29th, which
10 is like five working days before this argument, and
11 then again on May the 2nd, which is like two working
12 days before this argument.

13 So it's pretty clear to us that the motion to
14 compel has merit. These last-minute productions would
15 not have occurred, I think, without the motion to
16 compel and the notion that the motion is moot is
17 just -- is simply wrong.

18 Now, after we got the second production of
19 documents, one on March 25th and one on April the 4th,
20 we filed our joint reply. The joint reply contained
21 an affidavit from an attorney named Kristen Carney,
22 and she attached a chart to her affidavit.

23 Ms. Carney went through the productions of
24 March 25th and April 4th and set out in her chart 85
25 rows of descriptions of materials that should have

1 been produced before March the 25th.

2 In the plaintiff's surreply, they said that
3 they had produced most of the material that was
4 produced on March the 25th earlier in electronic
5 format. They didn't say they produced all of it; they
6 said that they produced most of it.

7 So between the time that we got the surreply
8 and today, we have tried to do a hurried audit of the
9 material that was actually sent earlier by electronic
10 means and contrast that with the material that we
11 received on March the 25th.

12 It turns out that of the 85 rows of
13 descriptions of materials in Ms. Carney's affidavit,
14 the plaintiffs had, in fact, earlier produced
15 electronically 26 rows of information. The other 59
16 rows had not been earlier produced but they should
17 have been.

18 The plaintiffs characterize that as most of
19 the March 25th discovery having been previously
20 produced electronically and that just seems -- it's
21 just not clear.

22 THE COURT: Now, I have Ms. Carney's
23 affidavit in front of me and let's talk again about
24 what she's done.

25 MR. SANDERS: All right. Your Honor, if

1 you'll look, attached to the affidavit is a chart.

2 THE COURT: Right.

3 MR. SANDERS: All right. And the chart
4 has horizontal rows and that's what I'm referring to.
5 There are 85 of those horizontal rows.

6 Now, I got this information from Ms. Carney
7 yesterday evening after I got to Tulsa with another
8 e-mail this morning. I can point out to you the rows
9 that Ms. Carney tells me the plaintiffs actually had
10 produced information for electronically.

11 THE COURT: Okay. What was their
12 original goal in the preparation of this table?

13 MR. SANDERS: To try to -- in the
14 plaintiff's -- in the plaintiff's reply or response,
15 they said that they had produced a lot of the March
16 25th production earlier electronically.

17 Ms. Carney tried to figure out -- I'm sorry.
18 I got that wrong.

19 THE COURT: Yeah. Hard copy.

20 MR. SANDERS: In the reply, our reply to
21 the plaintiff's original response, Ms. Carney looked
22 at the March 25th production of documents that came
23 with the plaintiff's response and she prepared this
24 chart to say, okay, the items on this chart represent
25 what we got on March the 25th from the plaintiffs.

1 All these items in this chart, these 85 rows, all
2 contain material that should have been produced much
3 earlier than March 25, 2008, but had not been
4 produced. So that's what this chart is.

5 Now, the plaintiffs then sought and received
6 permission to file a surreply and they filed a
7 surreply. The surreply says that most of the
8 information that they produced on March 25th had been
9 previously produced electronically.

10 Now, Ms. Carney took that surreply and she
11 looked to try to audit and see whether, in fact, the
12 plaintiffs had produced most of this material
13 electronically prior to March the 25th. What she
14 found was that for the 85 rows of information that are
15 in her chart that they say that they had produced most
16 of it previously electronically, they had actually
17 produced information that covered only 26 rows of
18 descriptions of information.

19 And I can point those out for the court if
20 the court wants to --

21 THE COURT: Oh, you might do a couple.

22 MR. SANDERS: All right. Well, they're
23 in a block. They start on page 5 of the chart
24 attached to Ms. Carney's affidavit.

25 If you look at page 5, if you look at the

1 fourth row -- the fourth row from the top, it's the
2 one -- the first one that says "n/a, n/a," and then it
3 says "20."

4 THE COURT: Page 5?

5 MR. SANDERS: Of the chart.

6 THE COURT: Of the chart. Oh, "n/a,
7 n/a." I see that.

8 MR. SANDERS: All right. If you take
9 that one, the first "n/a," and go to the bottom of the
10 page, all of those, and then on page 6, all of the
11 entries down to the third line from the bottom, and
12 that's the one that says "n/a, n/a, 50."

13 THE COURT: Okay.

14 MR. SANDERS: Ms. Carney's audit
15 indicates that the items that are described by those
16 rows were, in fact, produced electronically previously
17 by the plaintiff -- and by "previously," I mean
18 previous to March 25, 2008 -- but the other 59 rows of
19 descriptions of documents had not been produced
20 earlier. We saw those the first time -- for the first
21 time on March the 28th -- March the 25th of 2008.

22 THE COURT: Okay. Who is Ms. Carney?

23 MR. SANDERS: She's an attorney for
24 Cargill. She works, I believe, in Denver -- is it
25 Denver? -- the Denver offices of Faegre Benson.

1 THE COURT: Oh, okay.

2 MR. SANDERS: Now, the plaintiffs in
3 their surreply also attached an affidavit from a
4 fellow named Burgesser. Mr. Burgesser is the general
5 manager of the CDM lab in Denver, Colorado. CDM is
6 the lab that oversaw, I think, most of the data
7 production on behalf of plaintiffs. I want to take
8 just a minute to go through Mr. Burgesser's affidavit
9 because --

10 THE COURT: Okay. Let me get it. Where
11 are we going to find it?

12 MR. SANDERS: It's attached to the
13 plaintiff's surreply, which is document 1691.

14 THE COURT: Okay.

15 MR. SANDERS: Let me just highlight a
16 few things in Mr. Burgesser's affidavit, and let me
17 tell you, Your Honor, all of the things that he says
18 in this affidavit were adopted in the plaintiff's
19 surreply.

20 The first thing I want to mention to you is
21 paragraph 5 of the Burgesser affidavit. He says that
22 data from February of '08 was produced on March the
23 25th, 2008, and then he says that defendant's
24 complaint on this issue is unclear, meaning that
25 there's a short time lag there and what are the

1 defendants complaining about? The defendants in their
2 surreply use that very word, that they were unclear
3 about what we were complaining about.

4 Well, this data in part was bacterial data.
5 The thing that we're complaining about is that between
6 the time that the plaintiffs got this data in February
7 of '08 and the time that they gave it to us, March 25,
8 '08, there was a preliminary injunction hearing on the
9 issue of health. That's what our concern is. This
10 bacterial data is obviously relevant and important in
11 the PI and they held it from us until after the PI
12 hearing.

13 The next paragraph is paragraph 8 --

14 THE COURT: Okay. Well, you're probably
15 going to get to this, but what do you want to do about
16 that?

17 MR. SANDERS: Well, I'm not sure what we
18 can do -- we can't do anything in terms of the
19 preliminary injunction hearing, but the relief that we
20 want is relief that includes the exclusion of
21 evidence. Ultimately, we want the court to enter an
22 order that says that all scientific data that is
23 presently in the possession of the plaintiff shall be
24 given over to the defendants within ten days of the
25 date of this hearing.

1 Now, if the plaintiffs say they've given us
2 everything, well, fine, they suffer no harm then. But
3 when data pops up a few months from now that shows
4 they had it in their position before today and they
5 didn't give it to us within ten days from the date, we
6 want that excluded from use by the plaintiff.

7 THE COURT: Why can't we make that
8 decision then instead of now?

9 MR. SANDERS: Because, Your Honor, that
10 comes to -- that brings us to another motion to compel
11 and another delay of several months and we just don't
12 have the luxury of time any longer.

13 Then going forward, we want an order that
14 says that whenever the plaintiffs generate data, that
15 we get that data within ten days of the generation of
16 that data, not sometime after the QA/QC process is
17 completed, but within ten days of the generation, and
18 that any information, any data, that comes into the
19 possession of the plaintiffs going forward that is not
20 given to us within ten days of the generation shall be
21 excluded from use by the plaintiffs. I think that's
22 the only thing that's going to be effective here.

23 In the motion, we asked for attorneys' fees.
24 Frankly, in a case of this magnitude, the advantage to
25 be gained by delaying the disclosure of information

1 far outweighs the harm that the assessment of a few
2 thousand dollars in attorneys' fees can do.

3 THE COURT: Now, you're not asking for
4 sanctions as a result of the preliminary injunction
5 hearing?

6 MR. SANDERS: No, no, Your Honor. But
7 the sanction that we're asking for is the exclusion of
8 evidence by the plaintiff in the event that this
9 material -- that material is not turned over to us
10 within ten days of the generation. Once they generate
11 this data, it's very easy to get it to us.

12 But let me go back to the Burgesser affidavit
13 just for a second.

14 THE COURT: Okay.

15 MR. SANDERS: The next paragraph I
16 wanted to talk about was paragraph 8. Mr. Burgesser
17 says that sampling done in April and May of 2007 was
18 given to the plaintiffs in the summer and fall of
19 2007. You know, that's a lag there of several months
20 between the time the data was generated and the time
21 we got it. That's because they wait until the QA/QC
22 is done before they give us any of the raw data.

23 Paragraph 9 of the Burgesser affidavit, he
24 says that sampling done in June, July, and August of
25 '07 was given to the plaintiffs on November the 19th

1 of '07 and December the 28th, '07. Again, that's a
2 lag of five or six months there between the generation
3 of the data and the time that we first see it.

4 Paragraph 10 says that sampling done in
5 August of 2007 was produced to the plaintiffs in March
6 of '08, that March 25, 2008, production. He says it
7 was because the QA/QC was not completed until February
8 '08. Well, that's an eight-month lag between the time
9 of the generation of the data and the time that we
10 received it.

11 Paragraph 11 says that the January 8th
12 sampling was produced to us on March the 25th, 2008.
13 And, again, he says he doesn't understand what the
14 defendants are complaining about. And, again, we go
15 back where there was a preliminary injunction hearing
16 in that interim there.

17 And finally on paragraph 15, Mr. Burgesser
18 admits that one-half of the diatom and macroalgae
19 sampling that was done between September of 2006 and
20 May of 2007 was not produced until March 25, 2008.
21 That's what -- Mr. Burgesser admits that half of it
22 wasn't.

23 Well, it turns out we don't have the other
24 half so we still don't know where the other half is.
25 All we have gotten it appears on the diatom and

1 macroalgae production is what was produced on March
2 the 25th.

3 THE COURT: Okay. Which paragraph were
4 you talking about?

5 MR. SANDERS: That was paragraph 15,
6 Your Honor, of the Burgesser affidavit.

7 THE COURT: Okay. Gotcha.

8 MR. SANDERS: Now, there's another
9 category of sampling that we have just recently found
10 out about. The Oklahoma Conservation Commission is
11 working -- I believe it's with the U.S. Department of
12 Agriculture on doing some studies of riparian buffer
13 strips and looking at the possibility of buying up
14 riparian buffer strips.

15 The Oklahoma -- it's called a CREP program,
16 C-R-E-P. It stands for Conservation Reserve
17 Enhancement Program. It turns out that the Oklahoma
18 Conservation Commission is doing a lot of water
19 sampling and they're looking for the things that are
20 at issue in this litigation, phosphorus in the water,
21 other nutrients in the water, and that sort of thing.

22 Now, I don't know exactly how the CREP
23 program is being administered, but it appears that
24 some of the riparian landowners are being furnished
25 with copies of testing data, and some of that testing

1 data that has gone to them has found its way to us but
2 we haven't gotten anything from the State of Oklahoma
3 regarding this CREP testing.

4 Now, the CREP testing, because it's between
5 the Oklahoma Conservation Commission and the U.S.
6 Department of Agriculture, it may be that this is not
7 controlled by the plaintiff's lawyers in this
8 courtroom or the plaintiff's experts, but it is
9 testing that is being done by the plaintiff, the State
10 of Oklahoma, through its agency, the Oklahoma
11 Conservation Commission. It's highly relevant and the
12 State of Oklahoma should be producing it to us as it
13 is being generated but it is not.

14 So this leads us where we are. We have to
15 come to the court to try to get enforcement of a court
16 order, which to me is a very unusual circumstance.
17 That's why I say that the normal types of sanctions --
18 attorneys' fees and so forth -- they haven't been
19 effective, we don't have any reason to believe that
20 they will be effective from this point forward, and
21 that's why we are asking the court for relief which
22 includes the exclusion of evidence.

23 If we don't get that, the defendants are
24 going to be severely prejudiced and I'm not
25 exaggerating. We simply will not be able to have our

1 experts fully informed and we will not be able to
2 fully prepare unless we have some assurance that the
3 information that the court has already ordered to be
4 produced actually be produced.

5 So we would ask for relief that has that
6 sanction attached to it, Your Honor.

7 THE COURT: All right. The prejudice is
8 relevant. Can you describe specifically prejudice
9 suffered by this late production? I mean, you have
10 not asked Judge Frizzell to reopen the evidence in the
11 preliminary injunction.

12 MR. SANDERS: Oh, no, Your Honor. Well,
13 we haven't got a ruling on the preliminary injunction.
14 But --

15 THE COURT: You ought to ask for a
16 reopen before the ruling.

17 MR. SANDERS: Well, to describe the
18 prejudice -- I mean, this motion is prophylactic in a
19 sense, I suppose. You know, we need going forward to
20 get a better result than we've had in the past.

21 Now, the court's order was entered January of
22 '07. We tried not to come back to the court. The
23 motion explains all the different ways we've tried to
24 approach the plaintiff and so forth. But like I said
25 earlier, we're simply running out of time. We don't

1 have the luxury of more months to come back to the
2 court.

3 It's hard to describe the specific prejudices
4 because we don't know specifically what evidence and
5 what data we don't have. That's another reason we
6 want the raw data without having to wait until the
7 QA/QC process is finished. Because, you know, there's
8 no reason that we should not think that there's not
9 plenty of exculpatory evidence in there that may not
10 make it through the QA/QC. We don't know. But that's
11 why we want the raw data, so we can do our own
12 assessment of it as early as we can.

13 But to describe the specific prejudice, I
14 can't really do it because I don't know exactly what
15 we aren't getting but we know we aren't getting a lot.

16 THE COURT: All right. Looks like to me
17 there's two issues.

18 One is, did they produce substantive data
19 after the motion to compel was filed? If so, you're
20 asking for attorney fees which is appropriate in some
21 situations.

22 MR. SANDERS: We are.

23 THE COURT: And the second issue is, are
24 there productions not yet even made?

25 MR. SANDERS: Yes, Your Honor. I think

1 in their response, they say that CDM is going to do
2 some more testing. We know they're doing some more
3 testing. And they also say that USGS is going to do
4 some more testing. USGS, I think, has contracted with
5 the plaintiffs to do some --

6 THE COURT: Okay. So you're just
7 wanting a general order that says, "Data to be
8 produced within ten days of generation"?

9 MR. SANDERS: Yes, Your Honor.

10 THE COURT: You're not wanting me to
11 describe a specific data that has not been produced
12 and direct its production?

13 MR. SANDERS: No, Your Honor. I mean,
14 this motion applies across the waterfront. Any of the
15 scientific data that they have, we need it -- we need
16 it quickly and we want an order of exclusion if it's
17 not given to us quickly. You're right, it's all
18 data.

19 THE COURT: All right. And they argue
20 that your absence of a meet-and-confer would wipe out
21 your right to attorney fees?

22 MR. SANDERS: Well, Your Honor, we have
23 met and -- well, we have met and talked with the
24 plaintiffs numerous times since January '07 about the
25 need to get this data to us. The motion itself

1 describes the many instances that there have been
2 telephone calls, letters, and so forth. They didn't
3 complain about any meet-and-confer in their original
4 response.

5 Keep in mind, our reply was filed after they
6 gave us all of these documents on March 25th and April
7 the 4th. That's when it became so obvious that they
8 had been withholding materials that we added the
9 request for attorneys' fees as simply as part of the
10 original motion. I don't think that there needs to be
11 a separate meet-and-confer on the question of
12 attorneys' fees.

13 In our view, the plaintiff's behavior has
14 been so egregious that we think that attorneys' fees
15 are warranted. But, again, I think attorneys' fees
16 are not truly the effective relief that we need. We
17 need the threat and the order of exclusion of evidence
18 when they do not promptly give us the material we
19 need.

20 THE COURT: All right. Thank you.

21 MR. SANDERS: All right. Thank you,
22 Your Honor.

23 THE COURT: Mr. Bullock.

24 MR. BULLOCK: Thank you, Your Honor.

25 Let me start by setting out what I think is

1 the history of the production on this, and that is
2 that when the court entered its order for us to
3 produce the data, you set a date for that which was
4 February 1st. We made that date except for some
5 limited things that we got to them on the 8th by
6 agreement of the parties. We called them and said we
7 were having some delay and asked to complete it and
8 had an agreement to make it for the 8th.

9 After that, the question of supplementing --
10 of course your order didn't have any time for
11 supplementing. It was certainly understood under the
12 rules that there's a duty to timely supplement, so we
13 began a process of approximately every thirty to
14 forty-five days of supplementing our production. That
15 continued until perhaps December of this year when due
16 to the involvement of the preliminary injunction, it
17 frankly fell off the radar, folks were busy doing
18 that. And so once the preliminary injunction was
19 through, I instructed everybody to get everything
20 together, that I wanted everything completed. That
21 was what we ended up with with the March 25th
22 production.

23 I believe that the record shows -- and
24 whether you look at Todd Burgesser's affidavit or
25 whether you look at the affidavit produced by the

1 defendants -- that, in fact, we have a record of
2 timely producing these matters.

3 Before I get too deep into that, I do want to
4 explain the question of the QA/QC. The quality
5 assurance and quality control that we're talking about
6 here is the one performed by the CDM lab, and the
7 purpose of that is to make certain that each sampling
8 event or each -- all of the sampling data has with it
9 the chain of custody and check the quality assurance
10 from the labs and be sure that that is all contained.

11 There have been a few samples which have been
12 delayed by getting that data together, but it was
13 important that we get that data together. In fact,
14 until data has completed that QA/QC, it isn't given to
15 the plaintiff's experts to be used. So virtually
16 contemporaneous with our experts getting this, the
17 defendant's experts have gotten it. There may have
18 been a few weeks' delay in that depending on when we
19 gathered the stuff up at the lab. It is the
20 completion of that process which makes the data
21 usable.

22 So that's the reason why we did that, and we
23 made clear that we were doing that from the beginning.
24 And, of course, no motion to compel has been filed on
25 that.

1 THE COURT: But can you be more specific
2 about the QA/QC? You say they're checking on chain of
3 custody.

4 MR. BULLOCK: Okay. Well, yeah.

5 THE COURT: What else are they doing?

6 MR. BULLOCK: Well, they also were
7 checking that the laboratory -- the outside laboratory
8 performed their QA/QC; that is, the CDM lab gets the
9 data from these outside laboratories and then makes
10 certain that we have a chain of custody for that
11 sample and that the sample was submitted to the
12 outside lab's quality assurance process. Those are
13 the fundamental things that are done by the CDM lab.

14 THE COURT: This is like bacteria
15 samples from water?

16 MR. BULLOCK: Right. When they're
17 collected, a chain of custody is begun. In that case,
18 it's sent direct to the bacteria lab, I believe
19 generally EML. They then -- there are certain
20 protocols and certain quality assurance protocols that
21 the EML lab is required to implement.

22 We then get the data from the lab at the CDM
23 lab, and at that point the process is to match up the
24 chain of custodies and to go back and be sure that the
25 outside lab has performed the type of quality

1 assurance that's required.

2 THE COURT: Okay. Does CDM receive the
3 water samples themselves and test them?

4 MR. BULLOCK: No. No, they don't. They
5 receive the data from the outside lab and then check
6 on those other things.

7 THE COURT: Okay. Do the defendants get
8 a water sample?

9 MR. BULLOCK: On a few occasions, they
10 have. As a general matter, no.

11 THE COURT: So they don't receive the
12 water samples, all they get is the data that comes
13 from CDM?

14 MR. BULLOCK: Right, right. And so the
15 defendants, on the one hand, complain as to the
16 orderliness of the production, while at the same time
17 complaining that we take the production through this
18 QA/QC process before making it.

19 I urge the court that all of that has been
20 done in order to provide some orderliness to the
21 production.

22 THE COURT: Okay. After the sample is
23 taken, when is the testing done?

24 MR. BULLOCK: Well, the testing, it
25 depends -- it all depends on a number of things. I

1 think that some of that is weeks or perhaps past a
2 month before it's tested depending on what it is.

3 THE COURT: And that's done by EML?

4 MR. BULLOCK: And then that -- but even
5 once that testing is done doesn't necessarily mean
6 that we get the results from the lab. On occasion,
7 some of those have been delayed getting the results
8 actually from the outside lab and I don't have an
9 explanation for that.

10 Once we have received these at the CDM lab,
11 we then put the packages together and do the quality
12 assurance there, the second level of quality
13 assurance. And then within that periodically we've
14 updated the production, and I think that that has been
15 done in a timely manner historically.

16 I recognize the defendant's concern presently
17 about the question of getting it going forward as we
18 end up with this in this critical time, but I think
19 historic criticism of the timeliness is neither
20 appropriate nor itself timely. This has been the
21 process that we've used.

22 And while the defendants necessarily -- I
23 won't represent that they have appreciated it -- I
24 think that it's been important to provide some type of
25 order and cohesion to these so that when they have

1 gotten these large data packages with the results,
2 they also have received the chain of custodies and the
3 quality assurance.

4 Now, no data has been withheld, Judge. I can
5 say that categorically. We haven't done it. We won't
6 do it. It's just something that neither would make
7 sense nor it just is beyond the pale that anybody
8 would consider doing that.

9 There have been limited lapses. Frankly,
10 when we talk about whether something has been
11 prejudicial, I think that it's very difficult to make
12 a case that they have been prejudicial. When you look
13 at what the defendants say they complain about in
14 terms of the timeliness, most of the delay was the
15 result of this period of time from December until
16 March during which we were involved in the preliminary
17 injunction. And, in fact, the data which they
18 complain about not receiving was that data, unless it
19 was specifically produced as considered materials by
20 the experts, that was foreclosed by the court from
21 being used in the preliminary injunction. And so
22 that -- that really -- there was no prejudice there.

23 THE COURT: Is there still testing going
24 on?

25 MR. BULLOCK: Yes, there is, and it's

1 very limited.

2 When Mr. Sanders brought up the production of
3 April 29th and May 7th, those were the most recent
4 data that we received. I know that from talking to
5 the CDM lab at the end of last week, that there are a
6 few samples that they're still trying to match up with
7 the -- or get some information from the sending lab.
8 Hopefully, within the next few days we will have that.

9 I was asked whether or not they ought to hold
10 that until -- or hold the entire package and I
11 suggested we do it piecemeal, because I understand
12 that the last hours are always more important than the
13 first hours and have sought to expedite getting that.
14 We've contacted the labs where we're waiting for the
15 information to tell them to expedite the processing of
16 that so that we can get this to them in the most
17 timely fashion.

18 There are only -- there's very limited
19 categories of information which in the March
20 production I discovered in the process of scraping the
21 bottom, as it were, which had failed to be produced
22 and admittedly should have been produced earlier.
23 Those were, one, some field books by an employee of
24 CDM, they were not the field books of the people
25 supervising the sampling, but certainly they were

1 entitled to them. She didn't understand that anybody
2 would be interested in her field books perhaps because
3 she was a student. When we found out about them, we
4 provided those.

5 There was some what is called "synoptic
6 sampling," which was done early in the case, and
7 somehow when I got the information to copy, they had
8 overlooked that.

9 What that was was some preliminary
10 investigation. No data was produced as a result of
11 that. What it was they sent students out and what
12 they did was they collected some mud or the sediment,
13 and from that later sampling sites were designated and
14 then the sampling data from those sites has been
15 produced. So it was this preliminary investigation
16 that was done.

17 Defendants clearly were entitled to it.
18 There was no reason for us to withhold that. It
19 doesn't have any great shakes in terms of the case,
20 but they were in entitled to it and somehow it was
21 overlooked.

22 The other main class of information that Todd
23 Burgesser references was the diatom information. The
24 way that that got overlooked, so far as my
25 investigation says and tells me, is that those

1 were -- that particular type of sampling is not
2 processed through the CDM lab because it doesn't have
3 the type of formal QA/QC that you would -- such as the
4 metal data, metals, or the bacteria or the other.
5 This is a counting of diatoms and the classification
6 of diatoms.

7 And so that data when in the process somebody
8 thought, have we asked Dr. Stevenson for that data?
9 As it turned out, he had been overlooked and we
10 gathered that together.

11 Now, this is the first time I've heard, and
12 from what I knew coming in here I do not believe it
13 so, but I certainly would sit down and meet with the
14 defendants concerning their still missing other diatom
15 data. If there is, we want to get it to them. I'm
16 not aware of any that they're missing, but Mr. Sanders
17 says there is and there's an issue to sort out. Those
18 were clearly overlooked.

19 We've produced well over a hundred-thousand
20 pages, and this isn't just copies of files, these are
21 individually-produced and important pieces of data.
22 We produced that in a routine matter. I think that
23 it's gone well.

24 Did it turn out that we had overlooked a few
25 things? Yes. And I apologize for that but it

1 happened, and that's all I can say is that.

2 THE COURT: What time limit do you think
3 is appropriate for the future?

4 MR. BULLOCK: In light of the fact that
5 there's a limited amount, I don't have any problem
6 with supplementing the production every ten days with
7 the data as received from the outside labs, and then
8 we will follow up with the QA/QC and the chain of
9 custody. This is going to be a small enough amount
10 that getting that stuff paired up it shouldn't cause
11 too much chaos. That should be workable going
12 forward.

13 Let me address, though, another piece of it
14 that is a problem and needs to be addressed
15 separately, and Mr. Sanders referred to it as the data
16 from the CREP program being collected by OCC and the
17 USDA.

18 I have no idea what that's about, but I don't
19 believe that that is covered by this order; in fact,
20 it is not covered by this order. This order, while
21 not explicitly, overwhelmingly implicitly was
22 addressed solely to the data, the sampling data, being
23 generated by our experts, where we were sending people
24 out into the field specifically for the purpose of
25 gathering data for this case.

1 All along before that, since then, and
2 continuing on the agencies of the State of Oklahoma
3 have done their own routine sampling and that has
4 never been suggested in the course of this as being
5 covered by this order. They've been getting this data
6 since February of '07, and it's been plain on its face
7 that this has not been data produced by the OCC, by
8 the water board, by the DEQ. None of that has been
9 included in it and this order was never intended to
10 cover that.

11 Now, as to how the agencies handle that, how
12 to supplement it is well beyond my expertise. We are
13 more than happy to sit down with the defendants and
14 talk to them about those issues, and if necessary,
15 present it to Your Honor. I don't think that will be
16 necessary. But that shouldn't be included in this.
17 It certainly never has been in the past and has never
18 been understood to include it.

19 THE. COURT: Okay. Well, the OCC has
20 produced other data --

21 MR. BULLOCK: That's right.

22 THE COURT: -- in connection with this
23 lawsuit.

24 MR. BULLOCK: Right.

25 THE COURT: So you would think that

1 maybe this data is a part of the supplementation of
2 prior production?

3 MR. BULLOCK: That would be my belief,
4 is that it would be part of -- just as OWRB and DEQ
5 have continued to collect data, the OCC's data would
6 be part of that and those are going to need to be
7 supplemented. That's outside my area of
8 responsibility here, but I know that we have had
9 conversations concerning the need to supplement and I
10 think some work's being done to get that done.

11 Oh, the one other area is the USGS sampling.
12 The USGS sampling falls into its own category; that
13 is, the -- in response to this litigation -- there's
14 an ongoing sampling program between the Oklahoma Water
15 Board and USGS to do sampling in the IRW. There was
16 decades before this case was filed and long after the
17 case is resolved, I'm sure that that type of routine
18 sampling will go on.

19 What we did as part of this case, though, was
20 that we supplemented the requirements for that
21 sampling by the USGS and so we have been producing
22 USGS sampling as part of this program. In fact,
23 defendants complained about the lateness of it. As
24 soon as I got the USGS data, as soon as it was
25 provided to us, it was provided to the defendants. I

1 believe that at this point that data is also
2 simultaneously published on their Web site. Is
3 that -- well, we don't know. We don't know.

4 But we don't have any control over any of
5 that, Judge. When they give it to us, they give it to
6 us, and until we get it, we don't have it. Certainly,
7 that can be subject to the duty to supplement within
8 ten days because when I get it, I'm going to give it
9 to them.

10 But let me address the issue of sanctions.
11 Mr. Sanders seems to be less than clear as to the
12 issue of fees -- of sanctions for fees. That was
13 first injected in the reply -- in their reply brief
14 for the first time. I don't believe that there's
15 anything in this record -- in fact, I know there's
16 nothing in this record to warrant sanctions.

17 There is the fact that some things were
18 overlooked in spite of our obvious and palpable good
19 faith and due diligence in gathering this stuff and
20 producing it. And while they complain about the time,
21 they actually have not -- I don't believe that they
22 have made a case of any lack of due diligence and I
23 know that there hasn't been one. Those limited
24 categories of data that I addressed, I think that
25 they're set out fully.

1 The idea that we were not being diligent is
2 spoken to by the massive and the important data that
3 we have produced in this matter and our willingness on
4 every occasion when we received a letter from the
5 defendants to respond to those completely and to
6 invite further conversation if it wasn't. If you look
7 at the correspondence, you see that on December 19th,
8 I responded in detail to the defendants' concerns and
9 invited them to discuss it with us if they had any
10 issue.

11 And as for this concept that there have been
12 ongoing meet-and-confers, I contest that. Early on,
13 we had some phone calls between Mr. George and myself
14 which focused on the issue of the PCR data, the DNA
15 data. Now, that was -- contrary to what's been
16 presented in this court, there was nothing
17 surreptitious about that; that is, we put it on the
18 privilege log.

19 The privilege log, if you look at Exhibit 3
20 to our response brief, what you will see is that it
21 says something to the effect that the plaintiff is
22 investigating whether DNA can be used to track poultry
23 waste as it moves through the environment of the IRW.
24 We made that objection and there was nothing subtle or
25 indirect about it. That's what prompted the

1 conversations between me and Mr. George.

2 As soon as we developed a method, decided
3 what to test for, developed a method for testing, and
4 got data from that, we produced that data. That was
5 prompt and reasonable and went uncontested.

6 And so I don't think that there's anything in
7 this record that suggests any lack of diligence. I
8 know for a fact that we've worked hard to comply with
9 the court's order, have done so in good faith and
10 without reservation, and certainly without the
11 duplicity which is described here.

12 THE COURT: All right. Mr. Sanders
13 argues that the productions of March 25th, April 4th,
14 April 29th, and May 2nd were generated because of his
15 motion to compel.

16 MR. BULLOCK: We had already put that
17 into process to update the discovery before -- well,
18 no, I can't say that because in the midst of the
19 preliminary injunction hearing we received this
20 motion. But I think our history of producing
21 materials speaks for itself.

22 We certainly did find out after the motion to
23 compel was filed that we had overlooked a few things,
24 but that certainly -- we were trying to produce things
25 and had been diligent about producing things. So to

1 say that we only made a production because of the
2 motion to compel is to completely ignore the record of
3 ongoing productions.

4 The fact that from December until March they
5 don't receive anything, they don't call us and say,
6 when are you going to update your production again,
7 ought to obviate this motion itself, much less speak
8 to any need for sanctions.

9 Yes, we found in the course that there had
10 been some things overlooked. Did it happen after the
11 motion to compel was filed? Yes. But do we have a
12 record of producing the information? Yes, we do. And
13 that record speaks for itself in terms of the question
14 of motivation in this production.

15 THE COURT: Okay. Well, what do we do
16 about Rule 37 that says that if there is a production
17 made in response to a motion to compel, that attorney
18 fees are to be awarded?

19 MR. BULLOCK: Well, the cases on that
20 say that the court should look to the question of
21 whether or not, number one, there was a conferring in
22 good faith prior to the filing of the motion to
23 compel; no, there was not.

24 Then the question is one of whether this was
25 any lack of diligence on the part of the plaintiff or

1 whether the plaintiff actually performed in good
2 faith. The record here speaks to our good faith and
3 our diligence in doing this task and no sanctions
4 should be awarded.

5 THE COURT: Okay. What about the Carney
6 affidavit? As I recall, your brief does say that a
7 great majority of the data was already previously
8 produced.

9 MR. BULLOCK: Judge, I don't know
10 exactly how they came up with these categories for
11 these different groupings that they have here. But if
12 you go to the first page of that exhibit that we
13 looked at earlier --

14 THE COURT: All right.

15 MR. BULLOCK: -- those first are those
16 field books and the synoptic sampling that I spoke of
17 that had just been overlooked -- I'll wait for you to
18 get to it.

19 THE COURT: I'm actually there.

20 MR. BULLOCK: Okay. Those first parts
21 are the field books and the synoptic sampling.

22 THE COURT: Right.

23 MR. BULLOCK: Okay. But you go down to
24 the one -- to that first large line, that sampling
25 field work date -- this is the date that the sample

1 was actually gathered -- was December 4, 2007.

2 Now, I don't see how, in light of our history
3 of producing things and in light of the fact that the
4 court didn't have any rule in terms of supplementing,
5 that that which didn't receive -- we didn't receive in
6 our lab -- or the lab report, the external lab report,
7 was not dated until December 21st and so we received
8 it in the CDM lab right before Christmas, and I've
9 explained why there was a delay after that, that
10 simply does not speak to a lack of diligence on our
11 part.

12 THE COURT: I understand that. My
13 problem is the statement that the great majority of
14 the data had already been produced.

15 MR. BULLOCK: Well, that's absolutely
16 true, overwhelmingly true, over overwhelmingly is
17 true.

18 What we had in terms of the data was that
19 there was the data from the -- that our lab had from
20 about December until the March production, December
21 '07 to the March production. While that looks like a
22 lot, Judge, that is a very small percentage, a very
23 small percentage of it.

24 And so what you're really -- then what they
25 get were some large quantity of electronic data that

1 we had produced before in hard copy. They had asked
2 if we had any in electronic form, to provide it to
3 them; we did that. I don't know that that was
4 required by the court order, but if we have it, we're
5 going to give it to them.

6 THE COURT: But they're saying only 26
7 out the 85 lines.

8 MR. BULLOCK: Well, that's a question of
9 how you categorize the lines, that's not a question of
10 the amount of data, okay?

11 You look at these and I guess perhaps this
12 gives you an idea as to how much data we produced in
13 the history of this case. And I believe that attached
14 to our exhibit was the -- or attached to our response
15 was a listing of all the data that we've produced.

16 They're talking about 27 out of 85 lines in
17 terms of, number one, arbitrary classifications of the
18 most recent production. This is important that you
19 understand.

20 When those -- okay. See how I can put it?

21 The last production, these 85 lines, it
22 included back data that was electronic. That was the
23 27 that they talk about.

24 THE COURT: Right.

25 MR. BULLOCK: The rest of that was

1 current; that is, the December to March data with the
2 exception of those categories that I told you about,
3 the diatoms, the synoptic sampling, and those field
4 books. The production prior to this production was
5 well over a hundred-thousand pages --

6 THE COURT: Right.

7 MR. BULLOCK: -- that was supplemented
8 every 30 to 40 days.

9 So don't be misled that because this was
10 supplemented in March, it doesn't suggest at all that
11 we were withholding or not producing on an ongoing
12 matter; we did.

13 THE COURT: All right. The question I
14 guess is obvious. Apparently, we have a production
15 dispute here and not a privilege dispute? I mean,
16 you're not arguing there are things you have not
17 produced because of privilege?

18 MR. BULLOCK: No. I'm not sure that we
19 have anything, Judge. We claim the privilege only as
20 to two things. One was an analysis by Dr. Fisher --
21 this is what I recall off the top of my head -- an
22 analysis by Dr. Fisher of the ag census data. They
23 asked for that. I said, no, you're not entitled to
24 our analysis. The ag census data is available on the
25 web. We weren't withholding anything other than the

1 analysis of experts, it wasn't included.

2 And then there was the PCR DNA data, which
3 I've explained that, and we've produced it. I
4 understand that. Soon I'm going to get another data
5 report from that lab. As soon as we have it, we'll
6 provide it to the defendants.

7 But it is a discovery dispute or -- well, I
8 say it's a dispute. I'm not sure how much of a
9 dispute it is than the question of whether we should
10 be sanctioned because we've always produced the data
11 of whatever sort regardless of what we thought about
12 it when we got it.

13 THE COURT: Do you want to explain the
14 e-mail?

15 MR. BULLOCK: Yeah. That e-mail was --
16 the experts obviously heard that we were talking about
17 having a little different line drawn for the court in
18 terms of the question of whether or not this was from
19 a routine lab analysis or was of a different type of
20 lab analysis such that we asked the court to define it
21 earlier. That's what that reflects. You remember
22 that fight.

23 Then what the court does is the court said,
24 produce this information, and if you have something
25 else that you're going to withhold, if there's some

1 type of data that you don't think you should have to
2 produce because you still believe that it is
3 privileged, put it on the privilege log and defendants
4 can contest it.

5 We put it on the privilege log and defendants
6 never contested it. We produced all the data as we
7 got it. We went further than producing the data.
8 This is an important example in terms of our good
9 faith. Let me explain.

10 When we got the first data, I knew defendants
11 were anxious for it. I hand-delivered it to
12 Mr. George. Later came back at a hearing, I believe
13 before you, and then went back and had it
14 Bates-stamped and substituted. Didn't even have it
15 Bates-stamped.

16 Then I believe when we produced the second
17 piece of data, which as soon as we got it we provided
18 it to the defendants, then they complained about the
19 description of how this was, what it meant, how you
20 calculated it, why you chose this particular bacteria.
21 They had a lot of questions about it.

22 We had a right, I believe, to withhold that
23 until we did our expert reports. Instead, we paid to
24 have our scientists prepare a very detailed report
25 concerning the entire process of producing that and

1 provided that to them, and then we updated one more
2 time with further data. So I don't think that e-mail
3 says anything.

4 THE COURT: Okay.

5 MR. BULLOCK: Okay. Judge, we've done
6 this. We've worked hard to comply with your order,
7 even an order which had no time lines. We have
8 routinely supplemented it. We're certainly willing
9 going forward to work with the defendants because of
10 the clear change in the exigencies of time, but
11 there's been no failure on our part and no sanctions
12 are warranted.

13 THE COURT: All right. Thank you.

14 Mr. Sanders.

15 MR. SANDERS: Just very briefly, Your
16 Honor.

17 THE COURT: Apparently, they've agreed
18 to your ten days.

19 MR. SANDERS: Well, I want to -- I'm not
20 exactly sure. I think Mr. Bullock said that he is
21 willing to give us a production every ten days. I
22 don't know if he means ten days within the generation
23 like we're talking about, or whether he's just willing
24 to give us a report every ten days about information
25 that may be three months old.

1 THE COURT: I think he's saying ten days
2 from the generation of the data.

3 MR. SANDERS: All right. Well, if
4 that's what the plaintiffs are offering, then we
5 certainly -- we agree to that, but we still want the
6 exclusion device to be attached to the ruling.

7 Let me talk just very briefly about the CREP
8 data. This is the Oklahoma Conservation Commission.
9 Mr. Bullock says that he's not aware of it, but this
10 is extremely important and very relevant testing.

11 The OCC is a state agency. When the original
12 discovery was propounded to the plaintiff that
13 resulted in the court's January 5, 2007, order, that
14 discovery was propounded to the State of Oklahoma.

15 Now, the plaintiff's lawyers have taken the
16 position that all of the state agencies are one
17 unified body, the State of Oklahoma, and I think
18 that's probably correct.

19 THE COURT: Okay. I think he said
20 they're going to give you the CREP data.

21 MR. SANDERS: Well, that's fine, Your
22 Honor. I'd like to go a little bit beyond that.

23 We need a supplementation of all state agency
24 data that might be out there, if there's other besides
25 OCC. We need to have it by May the 15th. That's when

1 they're going to give us their expert reports and
2 that's -- I think that can easily be done. They have
3 complete control of the OCC, whether they are working
4 on this particular discovery or not.

5 THE COURT: Okay.

6 MR. SANDERS: Now, Mr. Bullock also said
7 that the data that's reflected in the Carney
8 affidavit -- that's the affidavit that the defendants
9 attached that was newly produced or that was -- he
10 said that the stuff had not been produced and was
11 first produced on March the 25th was data from new
12 testing in December, January of this year; I don't
13 know.

14 If you go back and look at the Carney
15 affidavit, all of those sampling dates -- almost all
16 of those sampling dates -- and the material we
17 received for the first time on March 25th, those
18 sampling dates are all in '06 and '07. It's just not
19 correct that the stuff that we had not received
20 previously was stuff from new testing. The Carney
21 affidavit has a -- one of the columns has a heading
22 "sampling date" and the court can look at that.

23 Also, I think Mr. Bullock indicated that he
24 gets data from USGS and then he sends it to us when he
25 gets it. Well, the USGS, as I understand it, has

1 contracted with the plaintiff to provide testing data.
2 I think some of the -- Mr. Bill Cauthron from the
3 Oklahoma Water Resources Board testified to that
4 effect. We need that data within ten days of the
5 generation, not ten days from when Mr. Bullock gets
6 it. I guess Mr. Bullock or the plaintiffs would have
7 to make arrangements with the USGS to make sure that
8 that happens but that needs to happen.

9 And finally, Your Honor, with regard to
10 attorneys' fees, I'd just point out that the present
11 motion could have been brought as a motion for
12 sanctions for contempt of court in which case
13 attorneys' fees would clearly be appropriate. We
14 think attorneys' fees are appropriate now and we ask
15 for that. But more than anything else, we still want
16 the device of exclusion attached to the court's order.

17 Thank you, Your Honor.

18 THE COURT: All right. Mr. Sanders, I'm
19 looking at the Carney affidavit, and it looks like the
20 vast majority of this is December 2007. There's one
21 2006, another 2006. But unless I'm looking at it
22 wrong --

23 MR. SANDERS: Let me catch up with you.
24 Just a second, Your Honor.

25 All right. If you'll look on the very first

1 page of her chart, this page -- remember, it's on
2 pages, I think, 5 and 6 where the block was that had
3 been produced to us in electronic format.

4 THE COURT: All right.

5 MR. SANDERS: This first page represents
6 data that we saw for the first time on March the 25th,
7 2008. If you look over at 1, 2, 3, 4, 5 -- the fifth
8 column gives the date for the sampling and these are
9 all 2006, 2007.

10 THE COURT: Right. Well, those are the
11 field books and synoptic field sheets but you're
12 correct.

13 MR. SANDERS: Right. But it's all 2006
14 and 2007 stuff that they had that they didn't give us
15 until March of 2008.

16 THE COURT: Right. But when you get
17 there to the bacteria sampling, it appears to be more
18 current.

19 MR. SANDERS: I believe those are some
20 of the ones that were in the block -- hang on a
21 second. What page are you in, Your Honor?

22 THE COURT: Page 1. The bacteria starts
23 December 2007.

24 MR. SANDERS: All right. You're
25 correct, it does.

1 THE COURT: Okay. And it kind of stays
2 there and then goes into 2008.

3 MR. SANDERS: That's correct, I think,
4 for the bacteria. Then you go over to page 4 and
5 it -- some of the testing for chloride and nitrates is
6 back in August 2007 and so on. Yeah, there's some.

7 THE COURT: Mr. Elrod.

8 MR. ELROD: I just want to revisit -- I
9 want to make sure that nothing is slipping between the
10 cracks and that we're not ships passing in the night
11 or any other metaphors that I can think of, I suppose.

12 Based on the grunts and groans that are
13 coming from this table when the OCC issue was raised,
14 I want to make sure that we're crystal clear that what
15 they are willing to supplement is all agency-created
16 sampling data in the Illinois River Watershed, whether
17 it come from the DEQ, the OWRB, or the OCC or any
18 other state agency that's doing any sampling.

19 It's been the historic position of the
20 Attorney General in this case that he represents all
21 of the agencies of the State of Oklahoma. He has
22 invoked the attorney-client privilege in terms of our
23 ability to contact any state agency personnel. To my
24 knowledge, the only people in the State of Oklahoma
25 he's graciously exempted from that privilege are the

1 universities, which, of course, are not actually state
2 agencies. I just want to make sure that's clear.

3 For instance, it's my understanding that
4 Dr. Dan Storm is doing work in the Illinois River
5 right now as we speak probably on behalf of OWRB and
6 that we also know that sampling is being done on
7 behalf of the OCC. So surely if the State of Oklahoma
8 is, in fact, a unitary entity, then we ought to be
9 entitled to that information.

10 MR. BULLOCK: Judge, I didn't question
11 at all what they're entitled to, but I urge the court
12 not to enter an order on this that's never been
13 briefed, never been argued, there's never been a
14 meet-and-confer on it.

15 Now, we're willing to have a prompt
16 meet-and-confer, but we're going to end up with a
17 messy record that's unclear as to what's to be
18 supplemented, how it's to be supplemented, and the
19 reasonableness in terms of time. I don't have any
20 experience with this and the court doesn't have any
21 pleading in front of you. This is a "throw that on
22 top and grab an order" and then we've got another
23 thing to fight about after the fact.

24 I really urge the court that this is
25 something that while clearly there's a feeling that it

1 needs to be tended to with some promptness, also needs
2 to be tended to with some level of detail and
3 expertise and sort out what the disagreements are
4 before the court just enters an order which none of us
5 really know how to even advise the court as to how to
6 enter that order, much less what times are reasonable.

7 THE COURT: Well, you've got two issues.
8 One is whether or not OWRB and the OCC are part of the
9 State of Oklahoma.

10 MR. BULLOCK: Absolutely. We have
11 produced from them and we're prepared to supplement
12 from them. That's not an issue.

13 THE COURT: Right. That's what I
14 thought.

15 The other issue is the federal rules require
16 regular supplementation of any discovery responses.

17 MR. BULLOCK: Right.

18 THE COURT: So I suppose now that
19 Mr. Elrod is just reminding everyone that that's what
20 the federal rules require and that is putting notice
21 on record that -- I mean, I would assume that you'd be
22 able to stand up and say, Your Honor, we have
23 supplemented every discovery response that's required
24 under the federal rules.

25 MR. BULLOCK: Well, that's outside of my

1 particular -- I'm not going to make a certification in
2 something that I don't deal with every day.

3 THE COURT: Right.

4 MR. BULLOCK: I can certify what we have
5 done in terms of the scientific data production
6 because I have overseen that. But we are certainly
7 willing to sit down with the defendants promptly and
8 get them the things that they're entitled to.

9 THE COURT: All right. Well, I'll just
10 remind both sides that there's full obligation of
11 supplementation under the rules. We've now mentioned
12 that on the record, which would tee the issue up if
13 somebody feels the need that they have not been
14 properly supplemented.

15 Mr. Elrod, did that take care of the issue
16 you had in mind?

17 MR. ELROD: Judge, I guess I'm a
18 dinosaur. But, you know, if he says we're entitled to
19 it and he says he'll give it to us, I don't need to
20 sit and meet and confer with them. I mean, that's one
21 of the reasons that the modern method of trying
22 lawsuits --

23 THE COURT: I think he's agreed that --

24 MR. ELROD: -- drives me nuts, Judge.

25 MR. BULLOCK: And the reason why I say

1 that is, when you talk about all the things generated
2 in these agencies, we can overwhelm them with that.
3 I'd like to get them the things that they have the
4 real interest in fast and not overwhelm them. That's
5 not our purpose to play that game.

6 MR. SANDERS: Your Honor, if I can just
7 say one thing.

8 The motion to compel was directed to the
9 State of Oklahoma and it's for all scientific data
10 that the State of Oklahoma has and that's what we
11 want.

12 THE COURT: All right. Well, I think
13 they have on the record admitted that OWRB and OCC is
14 a part of State of Oklahoma and will appropriately
15 comply.

16 All right. Well, I think that issue is
17 submitted. Hopefully, no one has further argument.
18 We will not rule from the bench. We do need to do an
19 appropriate order in regard to that particular motion
20 to compel.

21 It's 12:30, time is moving on, and I have
22 appropriately waited to deal with these last two
23 issues until blood sugar problems have began in hopes
24 that everyone will say, okay, we've got this worked
25 out. I don't think they're big issues.

1 We've got, well, 1683 and 1684. This is
2 what, the Cargill 30(b)(6) depositions? Has anyone
3 ever taken a Cargill 30(b)(6) deposition yet?

4 MR. TUCKER: No.

5 MR. ELROD: Your Honor, I've shown up
6 for two of them.

7 THE COURT: You've done a good job.

8 MR. TUCKER: All I was going to say to
9 the judge was, I may be speaking out of school, Your
10 Honor, but I believe Mr. Garren, who is out on a
11 family mission this weekend -- or this week, and I, I
12 think, resolved this issue, but as sure as I say it,
13 I'll be proven wrong, but Mr. Bullock says that he
14 thinks I might be right. So when he and I agree, how
15 can anything be wrong?

16 MR. BULLOCK: I think we do. We could
17 confer for a few minutes and let the court know.

18 MR. TUCKER: Would it be possible, Your
19 Honor, if, for example, we aren't able to solve it, if
20 we can just call you for a telephone hearing this
21 afternoon?

22 THE COURT: Yes.

23 MR. BULLOCK: That would be great.

24 MR. TUCKER: Save everybody else's
25 time.

1 THE COURT: It's a question of how many
2 people want to be in on that telephone call. As far
3 as I'm concerned, it only needs to be one lawyer for
4 the government and one for Cargill, unless someone
5 else feels the need to be involved.

6 *(Discussion held off the record)*

7 THE COURT: Does anyone -- well, do any
8 of the other defendants want to be involved in that
9 telephone hearing, if we have one, in regard to 1684
10 and 1683?

11 Okay. Seeing none, then, Mr. Tucker, it's
12 just you and the state.

13 MR. TUCKER: We'll back get to Your
14 Honor if we have a problem.

15 THE COURT: All right. It looks to me
16 like it's going to work out.

17 Well, all right. So my plan did work, which
18 leads us to 1687, and there that is, which is the
19 state's motion to put off Cobb-Vantress until after
20 May 15th, and this is May 5th so you've almost
21 achieved your desire.

22 Mr. Bullock, is this your motion?

23 MR. BULLOCK: No, it's Mr. Nance.

24 THE COURT: Mr. Nance. And
25 Cobb-Vantress is present?

1 MR. GEORGE: One of my clients, Your
2 Honor, Robert George.

3 MR. NANCE: Your Honor, in deference to
4 blood sugar, I'll move quickly. But I think it's
5 important that we do cover a certain amount of
6 material in order to put this in context.

7 THE COURT: Okay.

8 MR. NANCE: I'm Bob Nance once again for
9 the State of Oklahoma.

10 The subject of 30(b)(6) depositions of the
11 state began in earnest last August when Cargill
12 noticed five depositions and set them for September 3
13 through 7 of last year, which would have included
14 Labor Day for that matter. That deposition notice is
15 Exhibit 5 to the Tyson or the Cobb-Vantress response,
16 1697.

17 There were correspondence back and forth and
18 discussions dealing with those notices, but in the
19 fullness of time Cargill moved to compel, which is
20 document No. 1270. That happened on September 9th.
21 The state moved for protective order which, I believe,
22 is 1309 on October 5th. Those matters came on for
23 hearing before you on November 6th of last year.

24 At that time, which I believe was your
25 birthday -- wasn't it? Do I have that correct?

1 THE COURT: November 3rd.

2 MR. NANCE: Well then, we were pretty
3 close.

4 And the transcript on page 96 -- and I have
5 copies I can -- do you want one, Mr. George, or -- or
6 I can give one to the court, if you'd like. The court
7 says, "You may during the noon hour want to spend a
8 little time talking about maybe what these defendants
9 could offer in the way of coordination. That would
10 help resolve some of the concerns that plaintiffs have
11 before you hear a ruling by the court." Mr. Ehrich
12 for Cargill said they'd be happy to do that.

13 After lunch -- in fact, lunch was extended
14 awhile while we discussed this in the hall -- you
15 asked Ms. Hill if there was any birthday present that
16 could be offered in this regard. Ms. Hill reported
17 that there were discussions between the co-defendants.
18 Page 97 of the transcript she reports, "So we're
19 certainly willing to coordinate so when we get topics,
20 all of the defendants can in the same day, or however
21 many days, proceed to ask questions on these topics."

22 She says that in agreeing to coordinate --
23 you know, they're going to talk about the topics and
24 have it done by December 3rd. We'll get together with
25 our co-defendants and we'll put together a list of

1 topics that we can proceed with.

2 On page 98, she says, "We'll engage in that
3 discussion or work out after we look at these topics
4 that are jointly-agreed topics. And then after
5 December 3rd when we get the state this list of
6 topics, we'd expect some going back and forth on the
7 propriety of the topics as well as the number of
8 witnesses and the number of time, the amount of time
9 we'll need to complete the depositions, but this is
10 the way to start the conversation."

11 As of December 3rd, defendants as a whole are
12 not representing this as a be-all and end-all.

13 On page 99, she recognizes the state will
14 voice its reservations and we've agreed to engage in
15 conversations and further our meet-and-confer process
16 after a consolidated list is given to them on December
17 3rd.

18 On page 100, I basically said that that was,
19 in fact, the agreement and that the court did not need
20 to rule on any of the motions -- either of the motions
21 that were pending at that time. That agreement was
22 memorialized in your order of 1375 which came out on
23 November 14th.

24 In either late November or early December,
25 the defendants presented us with a list of 12 notices

1 on various topics. Those topics were our Exhibit 1 to
2 our motion which is 1687. It was simply a list of
3 topics, it was not a date. It was not a formal notice
4 in the sense that you usually get, but it was a list
5 of topics that we were supposed to further in our
6 discussion.

7 The next hearing that mentioned this matter,
8 Your Honor, was on December 6th, once again before
9 you. At page 40 of the transcript, Mr. Tucker says,
10 "Just by way of report to the court, as Your Honor
11 suggested, the parties have been discussing the topics
12 that will be covered. We have presented that in our
13 most recent revised list following discussions to the
14 state and they are considering it. They have not
15 rejected it. We believe they're considering it in
16 good faith so we have nothing to offer to the court,
17 no controversy to bring to the court at this time."

18 I agreed that there was no action needed on
19 either their motion to compel or our motion for
20 protective order. Those discussions were basically
21 memorialized in your order of November 7th, which is
22 No. 1409, that the two cross-motions were held in
23 abeyance at the request of the parties. You recognize
24 that discussions were ongoing between the parties to
25 resolve remaining issues. We were directed to file

1 motions to withdraw our respective motions or file a
2 status report advising what issues will remain
3 unresolved on or before January 11th.

4 I have one letter that went out that is not
5 currently in the record. Let me hand one, if I can,
6 to Mr. George and offer it to you, Your Honor.

7 This is my letter of December 31, 2007 --
8 I've got extras if you need a copy -- between -- to
9 Ms. Sutherland, who was at that point acting for
10 Cargill, as I recall, perhaps while Ms. Hill was off
11 on maternity leave.

12 It basically presented our view of their 12
13 topics, and I'm not suggesting that the substance of
14 this is vitally important at the present time. We did
15 make certain objections. We did tell them that we
16 understood in the very last paragraph that they were
17 most interested in notices 1 and 2, which were the
18 human health issues. We told them that we thought we
19 could prepare witnesses in late January or early
20 February on those topics. That was the last
21 substantive conversation I had with either
22 Ms. Sutherland or Ms. Hill who had been handling it up
23 to that point.

24 On January 11th, in compliance with the
25 court's order, each side presented a status report.

1 Ours was docket No. 1452. We basically said that --
2 we reported the parties are engaged in discussions
3 regarding scheduling of 30(b)(6) depositions of both
4 Cargill and the state in light of the need of all
5 parties to prepare for the preliminary injunction
6 hearings then scheduled for February 19th.

7 Without prejudice to the right of any party
8 after proper conference to seek relief from the court,
9 the state believes no action on the pending motions --
10 theirs 1270 and ours 1309 -- was required at present.

11 Then you issued a minute order dated the 16th
12 of January -- it's docket No. 1462 -- where you said
13 that based upon the status reports filed on the 11th,
14 the plaintiff's motion for protective order and
15 Cargill's motion to compel are stricken, to be refiled
16 should meet-and-confers fail to resolve the issues
17 following a hearing on the preliminary injunction, and
18 you deemed moot a motion to strike that we had filed.

19 That was in mid January, Your Honor, and of
20 course there's been a lot of water under the
21 preliminary injunction bridge since that time. But
22 that's where the matter lay as regards 30(b)(6)
23 depositions of the state for three months.

24 There was no response from Ms. Sutherland to
25 my letter. There was no further meet-and-confer.

1 There was no "pick up the phone." We had some
2 arguments, I think, that was the subject of a
3 telephone hearing where Mr. Garren was trying to get
4 Cargill to submit to a 30(b)(6) before the hearing and
5 you said no, that's not what's going to happen.

6 We basically got through the preliminary
7 injunction hearing, we had certain arguments about
8 additional time to prepare our expert witness reports,
9 and nothing on the 30(b)(6) front until April 14th of
10 this year. It wasn't Cargill who had been the party
11 that we had been dealing with on that, but it was
12 Cobb-Vantress who sent us a new notice. It was a
13 notice for 30(b)(6) depositions to be conducted two
14 weeks from that date, or on the 28th of April, and
15 they gave us five topics to inquire on, each with
16 subparts.

17 Now, these were some of the old topics that
18 we had talked about earlier or we had seen in the 12
19 deposition notices that we got late last year. But
20 there wasn't, as the court clearly contemplated, any
21 meet-and-confer about that, it was simply an ultimatum
22 that came to us. You can see those topics and the
23 notice are Exhibit 2 to our motion.

24 There are five areas of inquiry, and it's
25 important for the court to understand the extent to

1 which one -- these weren't the ones that we had began
2 preparing, the human health topics, that we thought we
3 would go with first at their earlier suggestion. They
4 were some of the other topics that had been brought
5 up.

6 The first was total maximum daily loads.
7 That originally had been four subparts. Your Honor,
8 if you're looking at our motion, it's 1687-3. The
9 actual attachment is page 7 of 12.

10 THE COURT: Let's see. Exhibit 7 is a
11 bunch of letters, would be Exhibit 3.

12 MR. NANCE: Are you looking at mine?

13 THE COURT: I'm looking at document
14 1687.

15 MR. NANCE: I'm sorry. It's Exhibit 2.
16 The docketing number on the top is 1687-3.

17 THE COURT: Yep, I have it.

18 MR. NANCE: Okay. And the actual topics
19 to be addressed in these proposed 30(b)(6) depositions
20 are on what's called "attachment A."

21 THE COURT: I see that.

22 MR. NANCE: The first four items on
23 total maximum daily loads are based upon the four we
24 got before but they have been beefed up. The original
25 notice, or the notice from late last year, had four

1 topics on it and these roughly correspond to those but
2 they're more detailed.

3 However, completely new topics, Judge, start
4 at page -- or at No. 5. I'm going to blow through
5 them they briefly but I think it's important to put
6 this in context.

7 In addition to what they'd asked us before on
8 TMDLs, they wanted the identity and location of all
9 documents generated or received by anyone performing a
10 TMDL in the IRW or any portion thereof, the identity
11 of each person who has at any time been hired or
12 employed to perform work on a TMDL in the IRW, the
13 dates of all work performed in connection with any and
14 all TMDLs for the IRW or any portion thereof.

15 THE COURT: Okay. Mr. Nance, I
16 understand the situation now, I think. Maybe a couple
17 of questions in regard to the lateness of the hour.

18 Is this a combined motion on behalf of all
19 the defendants or just Cobb-Vantress?

20 MR. NANCE: We asked that because we
21 were afraid that we were just getting one from one
22 defendant.

23 In my letter of, I believe, the 17th, which
24 is our Exhibit 3, posed that question back to Mr. Bond
25 and informed Mr. Bond that because of the expert

1 reports, we couldn't do these before the 15th.

2 Mr. Bond responded on the 18th of April, our Exhibit
3 4.

4 The crucial thing for our purposes today is
5 he says that we are willing to work with the
6 plaintiffs on scheduling of this deposition but we are
7 -- this is the fourth line from the bottom of the
8 first page -- but we are not willing to agree to begin
9 deposing witnesses until after May 15th.

10 THE COURT: All right. But we don't
11 know if -- it's not a combined notice on behalf of all
12 defendants.

13 MR. NANCE: He essentially says in the
14 first paragraph, I'm sorry, they know this is going to
15 be their only notice on these topics.

16 THE COURT: Okay.

17 MR. NANCE: And so I am satisfied,
18 unless Mr. George tells us something different, that
19 these are combined notices on these topics.

20 THE COURT: Okay. Your argument, it
21 seems to me, is much, much, much broader than your
22 brief. I mean, your brief just says, we don't have
23 time, we're getting expert reports ready, come see us
24 later.

25 But you're suggesting that some grand

1 organization of depositions need to be put in place,
2 it sounds like to me. Isn't that correct? That's the
3 reason you went through the history?

4 MR. NANCE: There is -- the history is,
5 as we left it in the last order you issued was to meet
6 and confer.

7 THE COURT: Right.

8 MR. NANCE: And that has not happened.

9 THE COURT: In regard to a deposition
10 discovery plan?

11 MR. NANCE: Right.

12 THE COURT: Which would include all
13 defendants?

14 MR. NANCE: Which would include all of
15 the defendants.

16 And the brief does show on page 3 the little
17 chart about how they've expanded the number of
18 subparts and they're asking us to do --

19 THE COURT: Okay. So I guess the
20 specific question is, what's the grounds for your
21 motion to quash this notice? I mean, what do you want
22 to happen?

23 MR. NANCE: We want the notice to be
24 quashed and these depositions to be scheduled after
25 the expert reports are due next week on the 15th

1 because we are quite legitimately engaged in getting
2 those reports done.

3 THE COURT: Well, that's probably not a
4 problem. I mean, you want to do it on the 18th? I
5 think your objections are broader than that.

6 MR. NANCE: Well, we would suggest
7 starting them on or about the 1st of June. It's just
8 a scheduling matter. We do have some substantive
9 objections, but this has moved with such haste, I
10 haven't put together -- I've got it in draft but I
11 haven't got it out -- a letter similar to the one I
12 sent to Ms. Sutherland earlier. Those are just
13 routine meet-and-confer and discuss it and see if you
14 can get along.

15 But the crucial thing when I spoke with
16 Mr. George on the 25th, I realized for the first time
17 they weren't going to accommodate us at all in getting
18 past those. I know Mr. Bond's letter had said that,
19 but there's no objective reason why they would have to
20 make us prep witnesses and start conducting these
21 depositions while we're working on expert reports
22 unless they just want to interfere with our production
23 of the expert reports.

24 We need to get those done. That's a
25 matter -- a deadline the court has set and it's -- I'm

1 not prepared to talk about it completely but it may be
2 a problem as it is. We're here now instead of working
3 on expert reports talking to you about it and it's
4 simply a scheduling matter that should have been
5 handled in the -- according to your order, and in the
6 spirit that we were working at late last year, by
7 meet-and-confer and we arrive at a legitimate workable
8 schedule.

9 They say basically that, well, they need this
10 stuff for their expert reports, which are due in three
11 months, when ours are due in nine days.

12 THE COURT: Well, all right. Let's see
13 what they've got to say. I mean, obviously the 15th
14 is only ten days away. So --

15 MR. GEORGE: Your Honor, Robert George
16 appearing for Defendant Cobb-Vantress.

17 To clearly answer the court's question with
18 regard to whether the notice is intended to be a
19 consolidated notice on behalf of all defendants, it
20 was. Certainly, if you look at the style of it, it's
21 issued by a particular defendant. But as we confirmed
22 with Mr. Nance, all defendants would recognize that
23 that is their opportunity to ask questions on those
24 topics of a state representative. So we're not trying
25 to hide the ball in that all.

1 I guess I would respond -- I don't intend to
2 go jot and tittle on Mr. Nance's history of how we got
3 to this point. But, Your Honor, I think what it
4 illustrates is we've spent about ten months talking
5 about discovery as opposed to taking discovery.

6 Your Honor, at some point in time, as much as
7 I am an advocate of meet and confer and collaboration,
8 at some point in time all of us as lawyers in the
9 defense side of this case have an obligation to our
10 clients to develop the evidence necessary to prepare a
11 defense.

12 And so after this process had stalled -- and
13 let me give the state some credit -- I believe
14 they -- I can't put this politely, Your Honor -- I
15 think they played the meet-and-confer game effectively
16 to their advantage to push these depositions out to a
17 time that is potentially prejudicial -- I'd say
18 expressly prejudicial to the defendants.

19 At some point in time, Your Honor, that has
20 to come to an end. That was the reason why I issued
21 the notice in April requesting a deposition.

22 And, Your Honor, for contrast, I think it's
23 important for this court to recognize the defendants
24 have already gone through the 30(b)(6) deposition
25 process. And as part of that, Your Honor, we handled

1 it in the traditional course that is contemplated by
2 rules.

3 The plaintiffs issued 30(b)(6) deposition
4 notices to my clients. They proposed a date on which
5 they wanted to take those depositions. We did have
6 some conversations around whether those dates would
7 work for witnesses. But we did not have a prelude of
8 negotiation around the particular topics that should
9 it be included in their notice or the order of those
10 topics.

11 Your Honor, I think at some point in time, we
12 have to step away from the bureaucracy that lawyers
13 like to create in a case like this and fall back to
14 what the rules provide.

15 THE COURT: Okay. He said he's willing
16 to start June 1st.

17 MR. GEORGE: Not soon enough, Your
18 Honor.

19 THE COURT: Well, okay. When do you
20 want it?

21 MR. GEORGE: Your Honor, I want it
22 before May the 15th, to be quite honest.

23 I appreciate and I understand the reaction
24 the court's having, Your Honor, but here's my
25 frustration.

1 If this court enters an order that allows the
2 defendants -- I'm sorry -- the plaintiffs to put off
3 these depositions until after May the 15th, that's
4 done two things.

5 First of all, it has rewarded the plaintiffs
6 for a unilateral act that is not contemplated under
7 the rules. Under the rules, you don't get to file a
8 motion for protective order and simply thumb your nose
9 at the deposition process. We've cited the cases in
10 the briefs that provide that it's a very serious
11 matter that you must actually obtain a protective
12 order and there's a reason for that.

13 The plaintiffs did not even attempt in any
14 way, other than an 11th-hour motion that they knew
15 would not realistically be acted upon, to accomplish
16 that.

17 Secondly, Your Honor, to answer Mr. Nance's
18 question of, what's the objective reason why the
19 defendants would want this before May the 15th, let's
20 think about what happens if we push it out after May
21 the 15th.

22 The plaintiffs have had three years, Your
23 Honor, to work on their expert reports; that's how
24 long this case has been pending. We've heard from
25 discovery matters that have been before you their

1 experts have been fully engaged and working and moving
2 toward a point in time of delivering expert reports to
3 the defendants. That period of time comes to a close
4 at the end -- I'm sorry -- on May the 15th.

5 At that point in time, Your Honor, the
6 defendants have three months under the current
7 scheduling order to absorb that information and to
8 complete our own process of preparing rebuttal expert
9 reports.

10 What Mr. Nance is saying, Your Honor, is that
11 there ought to be two sets of rules when it relates to
12 discovery and particularly this 30(b)(6) deposition.
13 Mr. Nance's position is that they should not have to
14 simultaneously participate in 30(b)(6) depositions
15 while they're working on expert reports but the
16 defendants should. It's patently unfair, Your Honor.
17 Every day in that three-month period is important to
18 the defendants and -- I see you have a question.

19 THE COURT: I understand your
20 frustration, but we don't even have an agreement in
21 regard to the deposition topics at this point, do we?

22 MR. GEORGE: I don't know that we need
23 an agreement, Your Honor. I don't believe I'm
24 required under the rules -- any litigant is required
25 under the rules to negotiate topics.

1 Your Honor, I've sent a notice. If they have
2 a problem with a topic that I have proposed, they have
3 a remedy, and that is to file a motion that states
4 what their issue is with a particular topic, why it's
5 not relevant, why it impedes upon privileged matters,
6 why it is unnecessarily burdensome. They've done none
7 of those things, Your Honor.

8 I don't believe that I should be required,
9 nor did I think the state should be required when they
10 sent me 30(b)(6) notices, to negotiate the topics with
11 the other side.

12 THE COURT: So these topics, apparently
13 you've agreed with them among all the defendants?

14 MR. GEORGE: Correct, Your Honor.

15 THE COURT: All the defendants are happy
16 with these?

17 MR. GEORGE: These are all topics that
18 each of the defendants believe are vitally important
19 at this juncture and need to be explored with a
20 representative who can make binding admissions on
21 behalf of the State of Oklahoma.

22 THE COURT: All right. Well, I think we
23 need to talk to Mr. Nance again to get this show on
24 the road. I mean, I understand your frustration. I'm
25 not sure I understand the state's position at this

1 point.

2 I mean, your brief said, I don't have time,
3 I'm doing expert reports, but now you've mentioned
4 some frustration with the notice and the topics. I
5 don't think that's in your brief, is it?

6 MR. GEORGE: Well, that issue was not
7 raised affirmatively in the state's motion for
8 protective order so I didn't respond to that. That's
9 correct, Your Honor.

10 THE COURT: Yeah. So go ahead, yeah.

11 Mr. Nance, I mean, your motion to quash
12 because you're busy doing expert reports basically can
13 be overruled. But if you have a motion to quash
14 because we need to fight about the coordination of
15 discovery and the -- and the scope of the topic, well,
16 that seems to me is something we do need to resolve.

17 MR. NANCE: Well, Your Honor, footnote 2
18 to our motion mentioned that we had objections to
19 overbreadth. I wrote this in one day and I wrote it
20 in haste and borrowed liberally, in fact, from
21 Mr. Tucker's motion on behalf of Cargill. We have
22 flagged that, but in the haste in which I wrote,
23 that's frankly the best I could do.

24 Now, as regards to any games we've been
25 playing, we put Shannon Phillips up, the lady you've

1 heard discussed, because she gave the affidavit. We
2 put her up as a 30(b)(6) witness when they noticed her
3 as an individual.

4 We said, we'll have her there. We'll have
5 her talk about these topics because she knew about
6 those topics and they are topics that they had
7 designated late last year. They refused to question
8 her and they didn't use the whole day, they had plenty
9 of time. They didn't use the whole day in what they
10 wanted to do. They had plenty of time to question
11 her. They didn't do it.

12 In fact, the letter that I handed up to you,
13 Judge, which was the letter I wrote to Ms. Sutherland
14 in December, is based in part upon some language that
15 I admired very much from Mr. George because he wrote a
16 similar letter when we did his 30(b)(6) deposition.

17 THE COURT: Okay. Well, my question
18 really is, what do you want to happen now?

19 MR. NANCE: I want the dates moved back
20 to the 1st of June. That's the critical thing.

21 THE COURT: To do what?

22 MR. NANCE: To do 30(b)(6) depositions
23 on these five topics.

24 THE COURT: And is it all directed
25 toward one person?

1 MR. NANCE: We will have to put up more
2 than one person to cover all five of those topics.

3 I would like an opportunity when the heat of
4 battle isn't on us to talk with either Mr. George or
5 Mr. Bond, or whoever the appropriate person is, about
6 some of those topics for some of the same reasons that
7 were in my letter to Ms. Sutherland.

8 If we can't resolve them, I guess we'll make
9 our record when the depositions go or we'll come back
10 before you. But I don't think the fact that they've
11 rushed this in the middle of our preparation of expert
12 reports should deprive me of the ability to be heard,
13 if I need to, on substantive objections to those
14 topics.

15 THE COURT: Well, that's not in your
16 motion. So the question is whether you're going to
17 file another motion?

18 MR. NANCE: I'd like to talk with them
19 before I have to file a motion. I think that's my
20 obligation. I've made a commitment that we will go on
21 the 1st of June.

22 I reserved in that footnote, in the haste I
23 had to write, the fact that we did have some
24 substantive issues with their topics. In fact, in
25 every letter I wrote to Mr. Bond I said the same

1 thing.

2 THE COURT: Okay.

3 *(Discussion held off the record)*

4 THE COURT: Well, I mean, on the face of
5 it, I would think your motion for protective order
6 should be overruled because I don't think there's
7 sufficient grounds in that motion to justify quashing
8 the deposition.

9 But having said that, obviously May 15th has
10 passed -- no, it's not -- the deposition itself has
11 passed so it's going to have to be reset at some time
12 anyway. So I could say, yes, June 1st is an
13 acceptable date or one week before that. That's not
14 that big a deal. But we need to know if it's going to
15 go on and who it is and then what's going to happen
16 for other depositions in the future.

17 MR. NANCE: Well, it will go
18 on -- again, I would like to talk with them. If
19 they're dead set on having TMDLs first or if they can
20 do one of the other topics first. I started with
21 TMDLs because it was just their topic one, it was the
22 first one.

23 We can put someone up on June the 1st and we
24 can continue to work through those topics. I think
25 that counsel owe each other an element of flexibility

1 on that and I think that's what Tyson did. They said,
2 we'll put this person up on these topics on that date.

3 THE COURT: It would seem to be
4 appropriate to come up with a deposition order
5 schedule.

6 MR. NANCE: And I think you contemplated
7 some sort of deposition plan when you told us to -- in
8 your last order on this. And rather than picking up
9 the phone and saying, well, Mr. Nance, it's time to do
10 that, we get the series of events that have been
11 described here.

12 THE COURT: Right.

13 MR. NANCE: And we're prepared to do
14 that with them on these topics.

15 THE COURT: What about requiring a
16 proposed deposition -- a combined deposition notice
17 and schedule proposed by both parties to be filed
18 within 30 days and then let the court enter an order?
19 I mean, I'm asking you if that seems to be an
20 appropriate resolution. I mean, that's not going to
21 slow down this deposition. This deposition needs to
22 go full-speed ahead.

23 Do we have any other depositions in the
24 pipeline or is this the only one noticed?

25 MR. NANCE: We have no other 30(b)(6)

1 depositions in the pipeline. I'm not aware of them
2 deposing any of our fact witnesses.

3 MR. BULLOCK: Of course, part of what
4 we're doing with Mr. Tucker is scheduling some
5 depositions. I'm sure that once they get our reports,
6 we're going to have to get those scheduled and we've
7 talked to people about setting time aside. We don't
8 know -- you know, we've been through their question of
9 being able to determine order. So we probably do have
10 some depositions coming up that we're going to have to
11 start working together to schedule.

12 THE COURT: Okay. Well, this is the
13 5th. I'd be inclined to require this deposition to
14 occur sometime before a week from the end of May.

15 MR. NANCE: Some --

16 THE COURT: In other words, you've asked
17 for June 1st. I'm saying June 1st minus seven days,
18 which, I guess, is May 23rd -- by May 23rd.

19 But two other questions. The one is whether
20 or not we're going to get a combined discovery order
21 or not in this case. Obviously, we don't have one and
22 this is the result of that.

23 And the second question that Mr. George
24 raised is, he noticed the deposition and you guys
25 didn't show up for it, which is not appropriate

1 without a court order staying the deposition or
2 quashing the deposition.

3 MR. NANCE: And, Your Honor, given the
4 way this was postured going in, that we were going to
5 meet and confer, I thought we could talk about it and
6 we would meet and confer and we would get a date that
7 wasn't during our expert report period because that's
8 what the court had told us to do. The court didn't
9 tell us to do what happened here.

10 THE COURT: Right.

11 MR. NANCE: I mean, it's explicit in
12 Mr. Bond's letter, they'll work with us on time, if
13 the 28th doesn't work, just so long as they can
14 interfere with our expert reports and start before the
15 15th. That's not a legitimate goal. That's --

16 THE COURT: Okay. Well, just as a
17 general announcement, anybody that files a motion to
18 quash, if you want to stay a deposition until after
19 the ruling, you're going to have to ask for an
20 expedited hearing and an order staying the deposition
21 until after the ruling on the motion to quash.
22 Otherwise, you're really hanging yourself out.

23 Okay. We're going to take this deposition on
24 or before the 23rd of May and -- I mean, we're not
25 going to quash the deposition. If you want a hearing

1 on any of these topics, then you're going to have to
2 file an emergency motion for a hearing and see if we
3 can get a telephone hearing of some kind.

4 MR. NANCE: We'll do.

5 THE COURT: But other than that, we need
6 to go full-speed ahead on the 23rd.

7 I don't know whether to issue an order
8 requiring a combined deposition schedule. I mean,
9 I've kind of implied that two or three times and it
10 never has happened. Everyone said, we don't need
11 that, we can work this out.

12 So what do you think?

13 MR. NANCE: I think it may be the time
14 to go that route.

15 THE COURT: All right. Well, I guess we
16 need to hear from Mr. George one more time. I mean,
17 I'm sympathetic to your position but there's nothing
18 else I think that I can do to help at this point.

19 Nobody showed up for the deposition, I
20 assume? I mean, you had no court reporter present --

21 MR. GEORGE: No. We actually did have a
22 court reporter appear and counsel for Cobb-Vantress
23 appeared and made a record that no one else
24 appeared.

25 THE COURT: Oh, okay. Where was that?

1 MR. GEORGE: Oklahoma City, where the
2 deposition was noticed in the offices of Ryan Whaley,
3 which is co-counsel for Tyson and Cobb-Vantress. So
4 we were prepared to move forward, Your Honor.

5 And in that regard, given the court, I
6 believe, has indicated that the motion for protective
7 order will be overruled, which I, of course, think is
8 proper, there was an alternative request -- or an
9 additional request in our response to that motion,
10 which was one for sanctions, which I believe are
11 squarely contemplated by Rule 37 in these
12 circumstances, particularly Rule 37, subpart D,
13 discussing the failure of a party -- in this case,
14 there's no doubt it was a party -- to attend a
15 deposition after a proper notice.

16 And, Your Honor, I struggled, to be quite
17 honest with you, in going through the options for
18 sanctions available under Rule 37 because, frankly, in
19 the three that are provided, only one of which makes
20 any sense in this case.

21 You, of course, could find and hold that
22 designated facts shall be taken as established. I
23 think that's difficult in a deposition setting
24 where those facts would be developed on the record.

25 The court has the ability to enter an order

1 prohibiting a party from introducing designated
2 matters into evidence. Of course that would be
3 counterintuitive because the purpose of the deposition
4 was for the defendant to discover information that we
5 want to introduce.

6 So that leaves us with subpart C which, among
7 other things, allows for striking of pleadings or
8 dismissing the action. So you saw in our response --
9 and I appreciate the gravity of this request -- that
10 we asked that the court dismiss the action, which is
11 the only remedy contemplated by Rule 37 that makes any
12 sense and would have any hopes of addressing the
13 prejudice on the facts and circumstances of this
14 particular motion. So I do want to just, before we
15 lose sight of that, go ahead and make a formal request
16 for that once again.

17 Your Honor, with regard to objections -- and
18 I think the announcement of your ruling covers this or
19 at least contemplates it -- if the state has
20 additional objections beyond the timing, which we've
21 now gotten past, that those need to be raised with the
22 parties and then to the court promptly so that they do
23 not impede the deposition by May the 23rd. I just
24 want to make sure I understand that. Because in
25 defendant's view, Mr. Nance and the plaintiffs have

1 had 20 days to raise those objections, they've had
2 that notice in their hands since early April, and have
3 had an opportunity, if they had concerns about the
4 topics, to raise those.

5 I'm very fearful, Your Honor, that what's
6 going to happen on the heels of your ruling is we're
7 going to get a five-page letter full of nuance
8 objections to every one of these topics and we're
9 going to be embroiled in another meet-and-confer and
10 the plaintiffs are going to try to use that process to
11 forestall the depositions.

12 So I want to make sure that I'm acting in
13 accord with this court's ruling if I proceed along the
14 following lines, which is absent of them doing
15 something to raise the issues affirmatively with the
16 court, we'll proceed with the deposition as noticed on
17 the topics as noticed on a date that we can agree on
18 between now and May 23rd?

19 THE COURT: That's correct.

20 MR. GEORGE: Okay.

21 THE COURT: Yes. And I suggest that if
22 they have substantive objections, that they can ask
23 for an expedited hearing. Obviously, the later that
24 occurs, the less time we're going to have to consider
25 them.

1 All right. In your request, your response,
2 you request dismissal?

3 MR. GEORGE: Correct, Your Honor. And
4 we, of course, cited cases from other jurisdictions
5 that establish that as the proper remedy when a party,
6 in particular, fails to appear for a noticed 30(b)(6)
7 deposition. So there's certainly authority for
8 that.

9 THE COURT: All right. Well, I can rule
10 from the bench at this time that I'm not going to
11 order dismissal of the plaintiff's case as this
12 particular sanction.

13 Is there any alternative sanction that you
14 have requested?

15 MR. GEORGE: You know, two that occur to
16 me, Your Honor. One would be -- and I think this is
17 pretty nominal in the grand scheme of things but it
18 would recognize at least the impropriety -- would be
19 an award of fees associated -- not just with having
20 someone appear for a deposition for 15 minutes of no
21 event, but the process of issuing the notice that was
22 not complied with, the process of responding to the
23 motion for protective order the court has overruled,
24 and the time associated with making the argument here
25 today.

1 As one form of alternative sanction, another,
2 one Your Honor, that's honestly just occurred to me is
3 the court, I believe, could sustain a waiver of the
4 other objections that were not raised in the motion
5 for protective order that we've heard from Mr. Nance
6 may be coming. Your Honor, certainly that would
7 expedite the process and would have a very practical
8 effect on facilitating a deposition that the
9 defendants very much need to complete.

10 THE COURT: Now, the problem is the
11 footnote speaks to your objection.

12 All right. Thank you.

13 MR. GEORGE: Thank you, Your Honor.

14 THE COURT: Mr. Nance, Mr. Bullock, do
15 you want to respond to the request for --

16 MR. BULLOCK: I do hope that in the
17 court considering the issue of sanctions that the
18 court does look at the way the Cargill matter was
19 handling, not only in terms of the questions which
20 we've resolved, including the scheduling, but the fact
21 that Cargill communicated to us that in spite of our
22 notice, they weren't going to produce a witness and
23 filed a motion to quash. Now, we're here to discuss
24 those things. We've resolved it.

25 The tendency in this case to go to sanctions

1 upon every sneeze makes it very difficult to work with
2 people to resolve problems, and I think the court
3 should look at the way the plaintiff's being treated
4 by the same people that are urging this in collateral
5 matters in deciding the issue of sanctions.

6 THE COURT: Do you have any idea why the
7 motion was so dilatory, the motion for protective
8 order, in the scheme of things?

9 MR. BULLOCK: Ours or Cargill's?

10 THE COURT: Yours.

11 MR. BULLOCK: Oh. Because ours was
12 actually earlier in time than Cargill's was in
13 relation to the depositions. So Mr. Nance will have
14 to speak -- I'm not conceding that it was dilatory.
15 He's got to speak as to the timing.

16 THE COURT: Okay.

17 MR. NANCE: Thank you, Your Honor.

18 Mr. Bond's letter, which is an exhibit to our
19 motion, indicates that he will work with us on the
20 time so long as it's started before the 15th of May.
21 I took that to mean that he would work with us on the
22 time and wanted to get with him and I wrote him a
23 letter about that.

24 If I'd realized the game of gotcha and
25 interrupting our preparation of expert reports that's

1 going on here, I would have filed sooner. But
2 Mr. George called me, he missed me, I called him back,
3 and we finally talked the Friday before the
4 deposition. He advised filing this motion, and I
5 realize that they weren't going to work with us so
6 that we could get that date beyond the 15th and they
7 weren't going to go in the sort of meet-and-confer
8 fashion that you had ordered back in January. And so
9 we filed our motion as quickly as we could thereafter.

10 I let him know in the morning of that Friday
11 that we would not put a witness up. I e-mailed him
12 but I misspelled his last name so he says he didn't
13 get it, and that's my fault and not his. But then we
14 wrote the subsequent letter to Mr. Bond later that
15 evening explaining that they had expanded the topics
16 and we that couldn't do this until after the expert
17 reports were done.

18 I, frankly, was surprised by the departure
19 from the cooperative attitude that we had had, and if

20 I --

21 THE COURT: So you sent an e-mail that
22 morning, he didn't get it?

23 MR. NANCE: He didn't get it. And I
24 didn't realize he didn't get it until yesterday when I
25 looked at the address on it.

1 THE COURT: The deposition was?

2 MR. NANCE: Monday, the 28th.

3 THE COURT: Okay. And so that evening
4 of the 28th you wrote him a letter or something?

5 MR. NANCE: Yeah. We spoke on the
6 morning of the 25th, Friday, Mr. George and I did. I
7 sent the e-mail at 10:25, he didn't get it, 10:25 a.m.
8 confirming that we would not appear, and then I would
9 write Mr. Bond a letter explaining that in more detail
10 later in the day, which I did, and then filed the
11 motion.

12 At his suggestion, when I realized at that
13 point there wasn't any discussion or there wasn't any
14 meet-and-confer that was going to work, they were
15 bound and determined to interrupt our expert witness
16 preparation and that's why it happened that late.

17 THE COURT: Okay. So you had not told
18 him a witness was not going to show up?

19 MR. NANCE: No. I told him that on the
20 phone on the morning of Friday, the 25th. I confirmed
21 by the misdirected e-mail and then I wrote a letter to
22 Mr. Bond that evening saying the same thing. They
23 knew Monday morning that we were not going to put a
24 witness up.

25 THE COURT: All right.

1 MR. NANCE: And that we had -- at that
2 point they knew we had gone to court on this motion.

3 THE COURT: All right. Mr. George, you
4 knew -- why did you have a court reporter there?

5 MR. GEORGE: Why, your Honor? To make a
6 record, which was attached to the response, Your
7 Honor.

8 THE COURT: Okay.

9 MR. GEORGE: In my prior practice, a
10 senior lawyer once taught me that if you're going to
11 complain about a deposition that didn't occur, you
12 better have a record of it. So that was the reason
13 for having it. Although, we were prepared to go
14 forward with the deposition when Mr. Nance notified
15 me.

16 I do think dates are important here, Your
17 Honor. The first instance that I had formal notice
18 that a witness would not certainly be produced in
19 accordance with the deposition notice was the Friday
20 before the deposition scheduled for Monday when I
21 reached out to Mr. Nance. Because the letter-writing
22 between he and Mr. Bond and Mr. Bond, who represents
23 Tyson, had sent the last letter, and the closing of
24 that letter is very clear, Your Honor.

25 It says that if April 28th is not a workable

1 date, the defendants are willing to reschedule but
2 request that plaintiffs provide dates before May the
3 15th. And then earlier in the letter, Mr. Bond says
4 that the defendants will not agree to put off these
5 depositions until after May the 15th.

6 That was the last written communication
7 between the parties on this. So when the date
8 approached, I felt the need to reach out to Mr. Nance
9 and ask whether they intended to produce someone or
10 they were going to provide an alternative date before
11 May the 15th. Mr. Nance at that point advised me that
12 no, neither, they don't intend to produce someone nor
13 do they intend to provide an alternative date before
14 May the 15th.

15 I told him at that point, just to be clear,
16 Your Honor, that not that he should file a motion for
17 protective order, but that he should get a protective
18 order.

19 THE COURT: All right. You know, I do
20 not have to rule from the bench on the issue of
21 sanctions. I think we've got the information I need
22 and I can spend a little time thinking about it and
23 we'll issue an order. But the order is going to
24 require the deposition be taken before the 23rd as
25 we've discussed on the record.

1 It's 1:15 and we need to get out of here,
2 which I think we can do. Is there anything else for
3 the plaintiffs at this time?

4 MR. BULLOCK: Your Honor --

5 THE COURT: Okay. Any of the
6 defendants?

7 MR. GEORGE: None, Your Honor.

8 *(Discussion held off the record)*

9 MR. NANCE: We would like that admitted
10 in the record, Your Honor. That's my letter to
11 Ms. Sutherland.

12 THE COURT: Okay.

13 MR. GEORGE: No objection, Your Honor.

14 THE COURT: Okay. Yes, I see. Letter
15 dated December 31, 2007. All right. It will be
16 admitted, Plaintiff's No. 1.

17 All right. We'll be in recess. It's good to
18 see everybody.

19 *(The proceedings were concluded)*

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C E R T I F I C A T E

I, Brian P. Neil, a Certified Court Reporter for the Eastern District of Oklahoma, do hereby certify that the foregoing is a true and accurate transcription of my stenographic notes and is a true record of the proceedings held in above-captioned case.

I further certify that I am not employed by or related to any party to this action by blood or marriage and that I am in no way interested in the outcome of this matter.

In witness whereof, I have hereunto set my hand this 15th day of May 2008.

s/ Brian P. Neil

Brian P. Neil, CSR-RPR, CRR, RMR
United States Court Reporter